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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 891) is reported in 69 F. Supp. 456.

JURISDICTION

The decree of the District Court was entered on March 28, 1947 (R. 923). The petition for appeal was filed on May 26, 1947, and was allowed the same day (R. 927). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 49

U. S. C. 45, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. 345. Probable jurisdiction was noted on October 13, 1947 (R. 931).

QUESTIONS PRESENTED

Whether the ownership by a holding company of all the stocks of a railroad and a producing company results in the railroad company violating the Commodities Clause when it transports commodities owned by the producing company, and whether *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, which gave a negative answer to this question, should now be overruled.

If it is necessary to show beyond the mere fact of such a three-company relationship that the power of control of the holding company has been so exercised as to constitute a community of interest between the railroad and producing companies, or domination of one by the other, whether the evidence here establishes such a community of interest or such domination.

STATUTE INVOLVED

The so-called Commodities Clause of the Act of June 29, 1906, as amended, 34 Stat. 584, 36 Stat. 547, 49 U. S. C. 1 (8), provides:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from

any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

STATEMENT

This is an equity suit brought by the United States[1] on June 4, 1943, in the District Court of the United States for the Western District of New York against South Buffalo Railway Company (South Buffalo), Bethlehem Steel Company (the Steel Company), and Bethlehem Steel Corporation (the Holding Company), charging a violation of the Commodities Clause and requesting that South Buffalo be enjoined

[1] Suit was brought at the request of the Interstate Commerce Commission pursuant to the provision of Section 12 of the Interstate Commerce Act which reads in part: "* * * upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part * * *." 25 Stat. 858, as amended, 49 U. S. C. 12 (1).

from further transporting commodities produced by the Bethlehem organization.

The answers of appellees denied that their activities and relations violated the Commodities Clause and trial of the cause followed, commencing January 22, 1946. The District Court concluded in its opinion that the relations among appellees prior to 1940 resulted in a violation of the Commodities Clause, but that those relations were significantly altered in December 1939, by a reorganization of South Buffalo's management and did not subsequently result in a violation of law. On the ground that the reorganization was undertaken in good faith, the court refused to consider other than the subsequent relationship among appellees. Accordingly, relief was denied and the complaint dismissed.

The findings of fact entered by the District Court were made primarily on the basis of the testimony of some 18 officers, employees, and directors of appellees, called by the Government, and more than 150 documents, mainly letters and memoranda of appellees, introduced by the Government. The statement of facts which follows is primarily rested upon the court's findings, but is supplemented occasionally by reference to the evidence, particularly with respect to the 1939 reorganization of South Buffalo's management, the effect of which is a principal ground of dispute between the parties. We accept almost in

their entirety those of the court's findings which deal with the pre-reorganization relations of the appellees and with the facts of the reorganization;[2] we challenge only those of the court's findings which deal with appellees' post-reorganization relations.[3]

I. DESCRIPTION OF APPELLEES

The Holding Company, a Delaware corporation, owning all or substantially all of the shares of approximately 57 corporations, including South Buffalo and the Steel Company, supervises and integrates the activities of all for the ultimate purpose of producing steel and steel products. Among the subsidiaries are those engaged in producing basic raw materials, such as iron ore and coal, in various States and in South America, and those engaged in transporting raw materials and finished products in ocean-going commerce and in inland waters. The products of the manufacturing subsidiaries range from ingots and slabs of raw steel to finished products such as ships and

[2] These are findings 1 to 34, inclusive (R. 909–917). Of these we challenge only minor portions of findings 21, 22, 24, and 29. While we do not challenge the correctness of findings 30 to 34, inclusive, which deal with the reorganization, we contend that they inadequately reflect undisputed evidence as to the reorganization.

[3] These are findings 35 to 49, inclusive (R. 917–921). Most of these do not purport to state evidentiary facts but are conclusory in nature. See, e. g., findings 35 to 40, inclusive, and findings 47, 48, and 49.

railway cars. The trial court found, "The activities of the subsidiaries are primarily undertaken for the ultimate purpose of the production of steel and steel products, chiefly by the Steel Company, and the sale thereof." (Fdg. 5, R. 910; Fdg. 19, R. 912.)

The Steel Company, a Pennsylvania corporation, is the principal manufacturing subsidiary of the Holding Company, engaged in the fabrication and sale of iron and steel and their products. The Holding Company owns all of the outstanding capital stock of the Steel Company. Manufacturing plants owned and operated by the Steel Company are located, among other places, at Lackawanna, New York. (Fdgs. 4, 6, R. 910.) All directors of the Steel Company are also directors of the Holding Company, and the companies have in common their respective presidents, secretary-treasurers, vice-presidents in charge of legal and financial matters, and comptrollers (Fdg. 6, R. 910).

South Buffalo, a New York corporation, is one of seven railroad companies, each of which is a wholly-owned subsidiary of the Holding Company. Each of these seven railroads is located in the vicinity of a steel manufacturing plant of the Steel Company and in each instance there is a direct physical connection between the respective railroads and the various plants of the Steel Com-

pany. The operating relations between the several railroads and the respective plants they serve is about the same as that existing between South Buffalo and the Steel Company's Lackawanna plant and, in each case, the railroad's principal source of revenue is the Steel Company. The railroads and the points at which they are located, which points are also the locations of plants of the Steel Company, are as follows:

South Buffalo Railway Co., Lackawanna, N. Y.
Conemaugh and Black Lick R. Co., Johnstown, Pa.
Cornwall R. Co., Lebanon, Pa.
Fore River R. Corp., Quincy, Mass.
Patapsco and Back Rivers R. Co., Sparrows Point, Md.
Philadelphia, Bethlehem and New England R. Co., Bethlehem, Pa.
Steelton and Highspire R. Co., Steelton, Pa.

(Fdg. 17, R. 912; R. 106-107, 240.)

The principal offices of all seven railroads are filled by the same persons and their salaries are prorated by agreement among the railroads, each of six, including South Buffalo, paying 16% of such salaries, and the seventh paying 4%. The offices of the railroads filled by the same person are those of president, vice-president, secretary-treasurer, general agent, auditor, purchasing agent and chief engineer. A common

audit and bookkeeping organization is maintained for all seven railroads. Since 1940, the railroads have their general offices in a building at Bethlehem owned by one of them, with rent and general offices expenses apportioned among them by agreement. Prior to 1940 all had their offices in the Steel Company's main building at Bethlehem.[4] (Fdgs. 17, 18, R. 912; R. 244–245, 597.)

The Holding Company operates under a system of management whereby specific fields of activity are placed in charge of individuals who usually also hold offices as presidents or vice-presidents of various companies within their fields. There are individuals in charge of financial and legal matters (McMath, a director of both the Holding Company and the Steel Company and a vice-president of both),[5] operations (Bent, a vice-president of the Steel Company), traffic problems (Gross, a vice-president of the Steel Company and a director of both it and the Holding Company), raw materials, purchasing, shipbuilding activities, and sales activities. When the Holding Company felt it necessary to put a

[4] At Lackawanna South Buffalo has had its own building since 1940 but prior to that time it rented office space from the Steel Company (Fdg. 17, R. 912).

[5] Finding 20 (R. 912) describes McMath as a director of the Holding Company and vice president of the Steel Company. McMath's uncontradicted testimony indicated he was an officer and director of both companies (R. 104–105).

man in charge of railroad activities in 1931 or 1932, Kemmerer was made president of each of its seven railroad subsidiaries. (Fdg. 20, F. 912; R. 122–123.)

Procurement of funds for the Bethlehem organization is largely the function of the Holding Company. Under ordinary circumstances a subsidiary would seek funds from it and not from outside sources. The Holding Company is primarily interested in the financial results of operations of its subsidiaries rather than in their declaration of dividends. Consolidated financial reports of the Bethlehem organization have been periodically issued since about 1905, based on reports rendered by the subsidiaries to the Holding Company as frequently as once a month. (Fdgs. 23, 24, R. 913; R. 119–121.)

South Buffalo operates 6 miles of main line track and 81 miles of spur track, all in Erie County, New York. It has direct physical connections with five railroad trunk-line systems and connections through interchange within the Buffalo Switching District with seven other trunk-line systems.[6] It transports freight between such trunk-line systems and the various industries it

[6] The court's finding 14 (R. 911) is that South Buffalo has direct connections with two trunk-line systems and indirect connections with five. "Direct connections" result when the connection is effected through interchange with a switching railroad (R. 92). When effected only through interchange with other trunk-line systems, the connection is "indirect."

serves. South Buffalo owns and operates about 35 locomotives, steam and Diesel, and a few freight cars used for its own work. (Fdg. 3, R. 909; Fdgs. 14, 15, R. 911.)

South Buffalo serves the Steel Company's Lackawanna plant and about 27 other independent business enterprises, but about 70% of its revenue over the five-year period ending December 31, 1945, was received from the Steel Company. South Buffalo provides the sole terminal connection between the Steel Company's Lackawanna plant and the trunk-line carriers. Its services include the outbound transportation, in interstate commerce of finished commodities produced by the Steel Company at Lackawanna, and the inbound transportation in interstate commerce of raw materials used by the Steel Company. (Fdgs. 15, 16, R. 911–912.)

The Steel Company's Lackawanna plant is located on 1,027 acres of land, west of and fronting on the Hamburg Turnpike in Lackawanna, New York. Within this plant confine are 58 miles of broad-gauge track and 13 miles of narrow-gauge track owned by the Steel Company and 58 miles of broad-gauge track owned by South Buffalo. The broad-gauge trackage of the two companies is interconnected at numerous points and South Buffalo operates over all such trackage in performing an extensive intraplant switching service for the Steel Company. Among other things,

South Buffalo moves the pig iron in molten form from the blast to the open hearth furnaces and the slag to the slag dumps. (Fdg. 13, R. 911; Fdg. 44, R. 920.)

The intermingling of trackage within the Lackawanna plant enclosure was brought about by the common corporate predecessor[1] of the Holding Company and the Steel Company on the day it acquired the properties. On October 10, 1922, Lackawanna Steel Company sold to such predecessor the steel plant at Lackawanna and 4,991 shares of South Buffalo (or all its outstanding shares except those used for qualifying directors). On that day, the predecessor sold to South Buffalo for about $850,000 approximately 75 miles of track located in and about the steel plant, and leased to South Buffalo for a period of 99 years the land and roadbed under the track. On October 10, 1923, additional land and roadbed were leased to South Buffalo for 98 years. (Fdgs. 8–12, R. 910–911.)

[1] The predecessor was the Bethlehem Steel Company of New York, Inc., which, about October 21, 1922, changed its name to Bethlehem Iron and Steel Corporation. In 1935 the latter conveyed the Lackawanna plant in its then existing condition to the Steel Company. The 4,991 shares of South Buffalo were transferred on its books from Bethlehem Iron and Steel Corporation to the Holding Company in 1936. On January 3, 1940, the Holding Company acquired the remaining nine shares previously used to qualify directors. (Fdgs. 9–11, R. 910–911.)

II. THE DOMINATION OF SOUTH BUFFALO PRIOR TO 1940

The trial court found that "From on or about October 10, 1923, to about December 1939, the Holding Company and the Steel Company in numerous ways and on numerous occasions so dominated South Buffalo as to effect a commingling of the identity and community of interest among South Buffalo, the Holding Company, and the Steel Company" (Fdg. 26, R. 914). Upon the basis of this finding, the trial court declared (in its Conclusions of Law, R. 922) that "Over a period of years immediately preceding 1939, the South Buffalo transported in interstate commerce articles or commodities in which it had an interest, direct or indirect, together with the Steel Company and the Holding Company, in violation of the provisions of the Commodities Clause." The trial court's conclusions as to the domination of South Buffalo prior to 1940 is supported by detailed findings derived from substantially undisputed evidence.

A. *Control through Selection of South Buffalo's Management.*—The trial court found that for a number of years prior to July 1938, five of South Buffalo's nine directors were employees of the Steel Company, while the remaining four directors were employees of South Buffalo. From July 1938 to December 1939, all of South Buffalo's directors were employees of South Buffalo

(Fdg. 31, 32, R. 916). Trageser, who became President of South Buffalo in 1933, had been an employee of the Steel Company since 1917. He discussed his candidacy for the presidency of the subsidiary railroads with McMath, the Holding Company's financial Vice-President, but he did not discuss it with the directors of South Buffalo. (R. 177–178, 186–187.) Similarly, Peters, Buffalo's Vice-President from 1923 to 1938, Donnelly, its Secretary-Treasurer from 1922 to 1938, together with the persons who served as Assistant Secretary and Treasurer, Auditor, Purchasing Agent, and Chief Engineer during those years, were all former employees of the Steel Company (Plts. Ex. 20, R. 696).

B. *Control of South Buffalo's Operations.*—The Holding Company required South Buffalo to apply for guidance and advice in the conduct of its operations to officials of the Steel Company. Among the problems referred by South Buffalo to the Steel Company for decision were problems concerning South Buffalo's service to other shippers and concerning such of its internal affairs as personnel and wage policies, equipment purchases, engineering matters, and construction of additions and extensions (Fdg. 26, R. 914).

Testimony of high officials of the Holding Company and Steel Company disclosed the basis upon which South Buffalo's routine problems were resolved for it by the Steel Company. The

Steel Company had a large, fully-developed, and well-trained organization, and South Buffalo, as a relatively small corporation, did not have the money to hire the type of managerial talent which the Steel Company had available. From the viewpoint of economy it was sensible and wise for South Buffalo to rely for guidance upon the Steel Company's expert organization. Since both companies were owned by the Holding Company, it was natural for South Buffalo to seek, and the Steel Company to proffer, advise from the latter's highly-paid and highly-qualified talent. (R. 123–126; Ex. 149, R. 819–820.)

Prior to 1940 numerous letters were written by officials of South Buffalo to officials of the Steel Company in which the latter were addressed as officials of South Buffalo. Many or most of these letters requested advise or instructions and were couched in terms of "I would ask your judgment," "What is your view of this matter?" "Kindly advise your wishes," and "We would appreciate your advice." Numerous letters were also written to South Buffalo by John M. Gross, a vice-president, director, and the general traffic manager of the Steel Company. Such letters were written on stationery of South Buffalo and purported to be signed by him as an official of South Buffalo. Many contained advice or instructions to South Buffalo. (Fdgs. 26, 27, R. 914–915.)

The domination and control exercised over South Buffalo was found by the district court to be specifically illustrated by the following, among other things:

(1) South Buffalo's vice-president wrote to the general manager of the Steel Company's Lackawanna plant asking that he "kindly advise what policy should be adopted" in regard to a possible sale of land by South Buffalo to Republic Steel Corporation. The inquiry was referred by the Steel Company's Lackawanna manager to its manager of real estate at Bethlehem for further advice;

(2) The Seneca Iron & Steel Company requested of South Buffalo a reduction in switching charges. This request was referred to Gross, the Steel Company's vice-president, who wrote to South Buffalo (on South Buffalo stationery as "General Traffic Manager") refusing the request. South Buffalo then wrote the Seneca Company that its request, though receiving the earnest consideration of South Buffalo's management, was refused. The Steel Company thereafter purchased the plant of the Seneca Company;

(3) Two problems arising from South Buffalo's relations with its customer, Buffalo Sintering Corporation, one involving a property encroachment and the other a license to the Sintering Corporation to operate a locomotive on South Buffalo's tracks, were referred to the Steel Company;

(4) South Buffalo officials conferred with Steel Company officials with respect to rates of pay to be adopted by South Buffalo. Under customary procedures, when it desired to employ personnel, it would submit a requisition to the Steel Company whose supervisor of employment would then interview applicants for jobs and pass on their fitness;

(5) Miscellaneous internal management problems of South Buffalo were referred to the Steel Company for determination, among such problems being the propriety of forms to be used in South Buffalo's business and the desirability of purchasing locomotives, of constructing or enlarging buildings, and of locating a floodlight. (Fdg. 26, R. 914–915; Fdg. 28, R. 916.)

C. *Control of South Buffalo's Finances.*—The Holding Company determined upon and made two contributions of capital to South Buffalo in late 1936 in the amounts of $211,616 and $1,900,000. South Buffalo took no part in any action leading to these contributions or the forms in which they were made. One officer of South Buffalo may have been advised of the Holding Company's general purpose in making the second contribution.

The first contribution was undertaken to avoid the payment of surtaxes (imposed by the Federal Revenue Act of 1936 on undistributed net income) on the more than $500,000 net income which South Buffalo realized from operations in 1936. The

books of South Buffalo showed a deficit from all operations by the end of 1935 in the amount of $46,163, and since New York law forbade the declaration of dividends which would impair the railroad's capital, it was necessary to clear away the deficit as a prerequisite to declaration of a dividend. Despite what South Buffalo's books showed as to its deficit, the books of the Holding Company showed its deficit to be $211,616 and a contribution in that amount was therefore made to South Buffalo by the Holding Company.

The second contribution arose from the fact that South Buffalo owed an open-account indebtedness of about $2,000,000 to the Holding Company. Officials of the Holding Company were concerned that South Buffalo's payment of most of its net income in dividends would be criticized in view of its substantial debt. Also, they considered that South Buffalo needed a proper credit standing. The matter was discussed among top officials of the Holding Company, and, with approval of its Board, it was determined to put $1,900,000 into South Buffalo's hands. At first it was contemplated that the transaction would take the form of a purchase by the Holding Company of further stock to be issued by South Buffalo. But it developed that the provisions of a mortgage on South Buffalo property required any additional stock issued by South Buffalo to be pledged under the mortgage. The Holding Com-

pany then decided that the sum already advanced to South Buffalo, should be treated as a contribution. (Fdg. 25, R. 914; R. 128–132; Ex. 142 (not printed).)

III. THE REORGANIZATION OF SOUTH BUFFALO'S MANAGEMENT.

Sometime after the decision of this Court in *United States* v. *Elgin, Joliet & Eastern Ry.*, 298 U. S. 492 (decided in May, 1936), the decision was called to the attention of Holding Company officials by its counsel. An investigation of the relationship between South Buffalo and the Steel Company caused Holding Company officials to conclude that "the theory of management had, to some extent, slopped over" (R. 125), and aroused their fear "that there were certain things which had happened which might possibly be within the language, at least of the minority decision, of the Court in that case" (R. 125–126). The matter was discussed by the financial vice-president of the Holding Company with its president, counsel, and other vice-presidents, and a decision was reached to reorganize South Buffalo so as to preclude the continued domination of South Buffalo. The Holding Company then instructed Steel Company officials to cease advising and instructing South Buffalo and interfering in its affairs. (Fdg. 30, R. 916; R. 135–136.)

An initial step in reorganization was taken in July 1938. For a long period of years prior to

that time a majority of the nine-man board of directors of South Buffalo were elected from among employees of the Steel Company. In July 1938, five directors of South Buffalo who were Steel Company employees resigned and their places were filled by employees of South Buffalo. The nine-man board of directors was thus constituted entirely of South Buffalo employees when, late in 1939, the principal reorganization was effected. (Fdgs. 31, 32, R. 916; Amended Complaint, Par. 18 (b), R. 8; South Buffalo's Answer to Amended Complaint, Par. 15, R. 36.)

In the view of Holding Company officials, a reorganization of South Buffalo's management to make it independent of the Steel Company required the selection of a new president for South Buffalo. The existing president, Trageser,[8] who had served satisfactorily since 1933 as president of South Buffalo and the other railroad subsidiaries, was not an engineer. Since prior reliance on the Steel Company organization for assistance was no longer to be encouraged, officials of the Holding Company considered it desirable to have as president of South Buffalo someone trained to deal with practical and operating prob-

[8] Trageser had been an employee of the Steel Company from about 1917 to 1933. He dealt with the Holding Company's financial vice president in connection with his candidacy in 1933 for the presidency of the subsidiary railroads and in connection with his salary. He did not speak to any of the directors of South Buffalo in connection with his desire to be president of South Buffalo. (R. 177–178, 186–187.)

lems who knew a great deal about the steel business and what steel plants required in the way of service. (R. 136–138.)

David M. Petty was selected by Holding Company officials to be the new president of the railroad subsidiaries following an interview which he had with Eugene Grace, president of both the Holding Company and the Steel Company. Grace told Petty he thought a man with his background would be helpful in the operation of the railroads and that he would like to place his name before the boards of directors of the seven railroads serving the seven Steel Company plants. Grace said that Petty's compensation would be about $25,000 per year as it has been. (R. 237–238, 269–271.) Petty had previously been for 30 years an employee of the Steel Company. He was not a railroader and had only such knowledge of railroad operations as he had gained in connection with Steel Company work. Petty's substantial asset was that he knew a great deal about the steel business and what steel plants require in the way of service. It is easier for the Steel Company to work with a man who represents the railroad if he knows something of the Steel Company's problems. Knowledge of the intricacies of railroading alone does not meet the Steel Company's requirements. (R. 137, 180, 236–237, 241–242.)

At the reorganization meeting of South Buffalo's board of directors on December 5, 1939, at

this point consisting of nine South Buffalo employees, Trageser submitted his resignation as president and suggested that Petty be chosen his successor as he had agreed with Holding Company officials to do. He was elected vice-president and Petty was elected president of South Buffalo to succeed him. Sellers, formerly an employee of the Steel Company, was elected to replace Craig, not a former employee of the Steel Company as secretary-treasurer. Craig was made assistant secretary-treasurer. (R. 221-223; Ex. 20, R. 696.)

Following the elections of the meeting, the important officers of South Buffalo were all former employees of the Steel Company. Vacancies filled since 1940 have, with one exception, involved only the replacement of one former Steel Company employee by another.* At the time of trial the officers of South Buffalo who were former Steel Company employees were:

D. M. Petty, President.
Paul A. Trageser, Vice-President.
C. F. Dullenkopf, Vice-President and General Superintendent.
G. E. Sellers, Secretary-Treasurer.

*Benning, not a former Steel Company employee, was replaced as vice-president and general superintendent by a Steel Company employee in 1941 (Ex. 20, R. 696). Benning, a South Buffalo employee since prior to its acquisition by the Bethlehem organization, had shown complete subservience to Bethlehem as the author of such letters as Exs. 54 (R. 726); 55 (R. 727); and 64 (R. 734).

C. J. Fatzinger, Auditor.
R. F. Maguire, Purchasing Agent.
Hugh M. Dalziel, Chief Engineer.

(Ex. 20, R. 696.)

All of these officers, except Dullenkopf, hold similar offices in the other six subsidiary railroads (*supra*, pp. 7-8).

At the meeting of December 5, 1939, seven directors resigned effective at the close of the meeting, leaving only Trageser and a vice-president and general superintendent of South Buffalo to continue as directors. Replacements of two were made by the election of Petty and Sellers, the newly installed secretary-treasurer of South Buffalo, as directors. (Fdg. 33, R. 917.)

The other five new directors, elected to take office in January 1940, were Buffalo businessmen having no connection with the appellees. While all are directors of other corporations and have had experience in business affairs, only one had previous experience in the management of railroads, having been at one time an assistant secretary of the Niagara Junction Railroad. (Fdg. 34, R. 917; R. 447, 465, 479, 493, 498.) They were solicited for the purpose by counsel for the Holding Company. None of these five "outside" directors knew that Petty and Trageser were former employees of the Steel Company or of the events at the meeting on December 5, 1939. (R. 451–453, 466–467, 481–482, 489–490, 500–501.) One was

told that the Steel Company wanted to divorce South Buffalo from Steel Company control and was looking for local directors (R. 500). Another was told by counsel for the Holding Company that he represented South Buffalo (R. 449); a third was told nothing but simply asked if he wished to become a director of South Buffalo (R. 480–481).[10]

IV. CONTROL OF SOUTH BUFFALO SINCE 1940

A. *Management Control.*—Since the reorganization, the board of directors of South Buffalo has continued to be composed of four employees of South Buffalo and five "outside" directors. Meetings of the board are held quarterly with an infrequent special meeting. (R. 447, 489.) At the meetings of the board either Petty or Trageser presides, and places before the board the matters for consideration and expresses his views why the various proposals should be adopted (R. 479–480, 489, 498–499). Each of the outside directors relies on the opinion of the presiding officers (R. 449, 470, 480, 489, 499). Every matter, with one possible exception, considered by the Board since 1939 has been determined by unanimous vote of

[10] One of the five directors originally chosen in 1939 resigned and was replaced in 1942 (R. 489). The statement above made relates to the five persons who were directors and testified at the time of trial; the resigned director did not testify.

the board in line with the recommendation of the presiding officer (R. 258, 453, 499).[11]

Although the South Buffalo board of directors annually elects, among others, an auditor and a purchasing agent (R. 601), not one of the "outside" directors could give the names of either of these officers or the name of the general agent (R. 453, 468–469, 483, 490–491, 502).[12] When Dullenkopf, who, since September 1943, has been general superintendent of South Buffalo, was recommended to the board by Petty, Petty told of Dullenkopf's experience with another railroad subsidiary of the Holding Company but did not mention that for 24 years Dullenkopf had been an employee of the Steel Company (R. 318–319, 468, 482–483, 501–502). Some of the directors were still unaware at the time of trial that Petty and Trageser were former employees of the Steel Company (R. 451, 459, 467–468, 501).

B. *Other Elements of Control.*—The incidents and occurrences subsequent to 1940 which were urged by the Government to establish a continuance of control over South Buffalo by its co-

[11] It appears that one year the amount of the dividend to be declared as suggested by Petty was lowered following discussion by the board (R. 258, 457). Compare the district court's finding that the Holding Company was interested in the results of operations by subsidiaries rather than their declaration of dividends (Fdg. 24, R. 913).

[12] One director testified he knew the name of the purchasing agent but did not give it. He also testified he knew the name of the auditor but it developed that he did not (R. 502).

appellees and the existence of a community of interest among them were the subject of adverse findings by the district court. In the interests of brevity and an orderly presentation, the relevant findings and evidence are reserved for statement at the appropriate point in our argument (*infra*, pp. 88–97).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In failing to hold that South Buffalo had an interest in commodities owned or produced by the Steel Company, the transportation of which by South Buffalo violated the Commodities Clause.

2. In failing to hold that the production of commodities by the Steel Company and the transportation of those commodities by South Buffalo were undertaken by the same authority, thereby making such transportation a violation of the Commodities Clause.

3. In holding that upon the authority of *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, the evidence fails to establish that appellees have violated the Commodities Clause.

4. In failing to hold that the evidence establishes a community of interest among appellees, and that South Buffalo has been so continuously dominated by its co-appellees that it has been operated as a mere department, agency, or instrumentality of one or both of them.

Both the express language and the clear purpose of the Commodities Clause require its application to prohibit a railroad company from transporting commodities owned by a manufacturing company where both companies are wholly-owned subsidiaries of a management holding company. Nothing in the legislative history of the Commodities Clause justifies an interpretation that Congress intended to permit easy evasion of its prohibition through the use of wholly-owned subsidiaries. Recognition of business realities compels the conclusion that where all of the stock of both railroad and shipper is owned by a single person, there is united in a single interest the conflicting roles of common carrier and shipper which the Commodities Clause requires to be separated. *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, should be overruled, because (1) it is a clear departure from the only prior case which considered the precise problem; (2) it is based upon a misinterpretation of the legislative history of the Commodities Clause; and (3) it ignores the community of interest and control which exists between railroad and shipper where both are wholly-owned subsidiaries of a common parent. Even assuming that such common and complete ownership of both railroad and shipper is not *per se* such a relationship as would preclude the railroad from transporting commodi-

ties owned by the shipper, the *Elgin* case further ignores realities by holding that the facts there involved did not constitute such actual domination of the railroad by the holding company as to warrant the conclusion that the railroad was operated merely as a department of a larger enterprise.

Even if this Court reaffirms the doctrine of the *Elgin* case—that mere ownership by a single person of all of the stock of both railroad and shipper is not sufficient to invoke the prohibition of the Commodities Clause—the substantially undisputed evidence in this case establishes that South Buffalo has been so completely dominated by the Holding Company, both directly and through the Steel Company that South Buffalo must be regarded as a department in an integrated steel-making enterprise. In fact, the elements which evidence domination and control of South Buffalo by the producing interest here far exceed the elements upon which the Government relied in the *Elgin* case. Under these circumstances, South Buffalo has an "interest, direct or indirect" in the commodities which it transports for the Steel Company, and is thereby violating the Commodities Clause.

The appellees' contentions (a) that the Commodities Clause has no application to the transportation service rendered by South Buffalo and (b), that a finding that South Buffalo is so dominated by the Holding Company will result in

the application of the Shippers Allowance Clause, and therefore in the non-applicability of the Commodities Clause, are without merit.

ARGUMENT

I

A RAILROAD VIOLATES THE COMMODITIES CLAUSE BY TRANSPORTING COMMODITIES OWNED OR PRODUCED BY AN AFFILIATE WHERE THE SHARES OF BOTH ARE WHOLLY HELD BY A MANAGEMENT HOLDING COMPANY

When South Buffalo transports commodities owned or produced by its close affiliate, the Steel Company, its activities fall squarely within the prohibition of the Commodities Clause against a railroad's transportation of articles "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."[13] But this Court held in *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, that the fact that both the railroad and its customer were wholly owned by the same corporation did not of itself establish a Commodities Clause violation; and that it was further necessary to establish by evidence that the power of control vested in the dominant company by virtue of stock

[13] There are two excepted classes of commodities neither of which is relevant here; timber products, and products necessary and intended by the railroad for use in its business as a carrier.

ownership had been so affirmatively exercised as to reduce the railroad to an agent, department or instrumentality of the producing interest. We will demonstrate that *Elgin* is based upon a misinterpretation of the legislative history of the statute and, by ignoring business realities, fails to give effect to the clear statutory command. Further, we contend that even accepting the doctrine of the *Elgin* case, the facts there involved should have compelled the conclusion that the railroad was actually so dominated by the holding company as to invoke the prohibition of the Commodities Clause.

A. *The Earlier Decisions under the Commodities Clause.*—This Court has often recognized that Congress, in enacting the Commodities Clause, sought to achieve genuine divorcement of the functions of interstate railroad transportation and production. The immediate impetus which underlay enactment of the Clause was provided by the situation about 1900 in the Pennsylvania anthracite coal regions, where a few railroads were rapidly obtaining control of all mines by ruthless suppression of the competition of non-railroad coal companies. But, though spurred by this dramatic example, Congress legislated generally to remedy the evils which resulted when railroads occupy "the dual and inconsistent positions of public carrier and private shipper." *United States* v. *Delaware, Lackawanna &*

Western R. Co., 238 U. S. 516, 525. The purpose of the Clause was "to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper." *United States* v. *Reading Co.*, 253 U. S. 26, 60-61.[14]

The Commodities Clause first came came before this Court in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The United States had commenced proceedings by bills in equity against six railroads, all operating in the Pennsylvania coal regions and all owning shares in companies engaged in mining coal, ranging from a small to complete stock ownership.[15] On the basis of the

[14] "The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier * * * [It] was aimed * * * at the suppression of the power and the favorable opportunity * * * to engage in practices * * * inimical to the performance of carrier duties to the public." Mr. Justice Stone, dissenting in *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 504.

[15] The six railroads were: Delaware & Hudson Company, Erie Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Pennsylvania Railroad Company, and Lehigh Valley Railroad Company. The answer of Delaware, Lackawanna & Western left it uncertain whether it owned shares in companies engaged in mining coal. Some of the defendants also

submitted pleadings, the lower court had determined that the Commodities Clause was unconstitutional, being, not a regulation of interstate commerce within the powers of a Congress, but an absolute exclusion from commerce violative of the Fifth Amendment."

This Court entered upon an extensive analysis of the Commodities Clause, indicating that a cardinal guide in its construction was the necessity of avoiding what it regarded as serious questions of constitutional power. As to the point of current inquiry, the Government contended that any stock ownership, however small, by a railroad company in a coal company constituted an "interest" in the coal transported by the railroad for the coal company within the meaning of the Commodities Clause. (Brief for the United States, Nos. 559–570, October Term 1908, pp. 134–136). This contention was rejected by the Court primarily in view of the constitutional doubts engendered by a construction with such "far-reaching consequences" (213 U. S. at 415) but also on the

owned or leased fields and mined coal directly as well as through the agency of subsidiaries.

" *United States* v. *Delaware & H. Co.*, 164 Fed. 215 (C. C. E. D. Pa.). The constitutionality of the Commodities Clause was at this date a lively issue. See William Draper Lewis, *Constitutional Questions Involved in the Commodity Clause of the Hepburn Act* (1908), 21 Harv. L. Rev. 595; Learned Hand, *The Commodities Clause and the Fifth Amendment* (1909), 22 Harv. L. Rev. 250.

basis of this Court's interpretation of the legislative history of the Commodities Clause (as to which, see *infra*, pp. 51–52). The Commodities Clause was held to prohibit a railroad's transportation of commodities in which it had a legal or equitable interest, "not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder" (p. 415).[11] Thus, in the *Delaware & Hudson* case, this Court held, *inter alia*, that a Commodities Clause violation was not established by merely showing that the railroad owned all of the capital stock of a shipper whose goods were transported by the railroad.

On remand of the cases, the United States sought leave to amend the bill against the Lehigh Valley Railroad Company. The amended bill averred that the railroad owned all the shares of

[11] Mr. Justice Harlan, dissenting, said: * * * In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transportation company from doing injustice to other owners of coal" (p. 149).

one coal company (the Lehigh Valley Coal Company) and had so used the power resulting from its stock ownership "as to deprive the coal company of all real, independent existence and to make it virtually but an agency or dependency or department of the railroad company." The lower court's refusal to permit the amended bill to be filed was reversed by this Court. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 268. The Court, adhering to the view that a carrier's ownership of shares in a *bona fide* producing corporation would not violate the Commodities Clause, determined that a violation would result if the carrier exercised control over the producer through stock ownership

> which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad [p. 273].[18]

[18] The United States moved in the Circuit Court that the bills against the Erie, Central of New Jersey, and Pennsylvania be dismissed without prejudice. On denial of this motion and upon the Government's statement that it did not intend to proceed further with the cases, the Circuit Court entered decrees dismissing all absolutely. This action was affirmed. *United States* v. *Erie R. Co.*, 220 U. S. 275.

A third decision involving the Lehigh Valley's efforts to engage both in transportation and coal mining came before this Court in *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255. Following the decision above set forth, the railroad suggested to its wholly-owned subsidiary, the Lehigh Valley Coal Company, that it consider the organization of a sales company. On the same day that the Railroad Company declared a dividend of $6,060,800, the Coal Company announced the organization of the Lehigh Valley Sales Company and authorized the purchase of stock in it by shareholders of the Railroad Company in an amount not to exceed $6,060,800. The stock of the Sales Company was consequently held 97% by shareholders of the Railroad Company. The Sales and Coal companies entered into a contract whereby the Sales Company agreed to buy all the coal of the Coal Company, and no other coal. The resulting involved relationship was held not to have divested the Railroad Company of interest in the coal so as to permit it to transport the coal in compliance with the Commodities Clause.

A similar relationship was held to involve a violation of the Commodities Clause in *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516. There, following the decision in the first Commodities Clause case, the railroad organized a coal company, invited its shareholders to subscribe to stock in the coal company, and declared a cash dividend adequate to

cover payment for stock in the new coal company. The two companies had common officers and 99% common shareholders. The railroad continued to mine coal but transferred title to it to the coal company at the mouth of the mines before transportation began. A peculiarly restrictive sales agreement, very similar to that in the last *Lehigh Valley* case referred to above, provided that the railroad should sell, and the coal company buy, all coal mined by the railroad, the coal company not to buy coal from any other source. Pointing out that the coal company was a mere puppet subject to the railroad's control, this Court concluded that the railroad had an interest, violative of the Commodities Clause, in the coal which it transported."[19] In this case, the Court referred to the legislative history of the Commodities Clause as indicating that mere ownership by a railroad or its stockholders of all of the stock of a shipper was not intended by Congress to constitute a violation of that statute.

It will be observed that all the foregoing cases involve instances in which the railroad company is the dominant interest involved, either holding shares of a producing company directly or stage-

[19] In *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, this Court affirmed a judgment of guilty following the railroad's indictment for transporting hay to be fed to mules employed in its coal mines, thus holding that the Commodities Clause applies to the inbound transportation of raw materials, as well as to the outbound transportation of commodities.

managing the creation of an affiliated producing corporation whose stock would be owned by the railroad's stockholders. Only two cases have arisen involving a basic factual pattern identical with the present case in that a holding company has owned all the shares of both a shipper and a railroad which transported commodities owned or produced by such shipper.

In the first of these, *United States v. Reading Co.*, 253 U. S. 26, we believe that this Court distinguished the earlier cases on the basis of the differing organizational patterns involved and determined that a violation of the Commodities Clause necessarily resulted from the relationship before it. This Court said that the question before it was not one in which a railroad owned shares in a producer and criticized the lower court's reliance upon the *Delaware & Hudson Company* case, saying (p. 60):

> The real question is whether combining in a single corporation the ownership of all the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The Court pointed out that the Commodities Clause was designed to prevent potential discrimination and continued that "the evil to be remedied" was present in the case before it

> as fully as if the title to both the coal lands and the railroads were in the Hold-

> ing Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—and discriminating practice which would harm the general shipper would profit the Holding Company [p. 61].

The Court concluded that the situation before it was within the language of the Commodities Clause since coal was both mined and transported under the same authority, and so gave an affirmative answer to what it had posed as the "real question" before it.[20] It then turned to the situation of another defendant railroad (the Central Railroad Company of New Jersey) which owned eleven-twelfths of the stock of a coal company, and described this relation as posing a "different question" as to which the authority of earlier

[20] While the Court based its distinction of the earlier cases entirely upon the differing corporate relations involved, without further elaboration, it may well have been influenced by such considerations as were subsequently expressed by Mr. Justice Stone in his dissent in the *Elgin* case. He considered control of a railroad by a producer "far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated." *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 507.

cases was applicable. It concluded in fact that the railroad had used the coal company as the "coal mining department of its organization" and consequently that the transportation involved was within the ban of the Commodities Clause (pp. 62–63).[21]

In *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, the second case involving the three-company relationship, this Court rejected the view that such a relationship of itself established a Commodities Clause violation. It held that the language in *Reading* could not be taken as the "declaration of an abstract principle" (298 U. S. at 501), but had application only to the particular circumstances there presented. The principal distinguishing circumstance was considered to be that in *Reading*, unlike *Elgin*, the three companies had the same officers and directors. This Court, therefore, brushed aside the *Reading* precedent and reverted, as authoritative, to the reasoning of the older cases which *Reading* had rejected. It concluded that, though a management holding company held all the stock of both railroad and shipper, a Commodities Clause violation resulted only if the holding company's undoubted power of control was affirmatively exercised, and that this exercise must be

[21] It is significant that Chief Justice White, author of the first two opinions under the Commodities Clause, dissented in the *Reading* case for the reasons set forth in the lower court opinion: i. e., that the rule enunciated in *Delaware & Hudson* was applicable and the cases were indistinguishable.

established by proof of acts involving invasion of the subsidiary's management function.

We believe that the decision should be reconsidered, but not merely because of its *Elgin* rejection of the *Reading* precedent. The primary ground upon which we ask this Court to overrule *Elgin* is predicated upon our contention that the *Elgin* decision is in disregard of the plain language and purpose of the Commodities Clause. To this contention we now turn.

B. *Both the Express Language and Purpose of the Commodities Clause Require a Holding that it is Violated Where Both the Railroad and the Shipper are wholly-owned Subsidiaries of a Common Parent.*—Reading the Commodities Clause, and giving to its words their natural meaning, two things seem clear: first, Congress prohibited a railroad company from transporting any commodity which it owned or produced, in the usual sense of direct ownership or production; secondly, since the Congress was concerned with substance, it extended the prohibition to commodities produced under the "authority" of the railroad company and to commodities "in which it may have any interest, direct or indirect." This choice of language, on its face, can only mean that Congress intended genuinely to divorce the interstate transportation of commodities from their manufacture or production, and that it further intended that this policy was not to be thwarted and evaded by indirection.

The purpose of the Commodities Clause, as this Court has often recognized (see, *supra*, pp. 29–30), is to prohibit a railroad from transporting commodities as to which, because of the railroad's ownership of or interest in such commodities, the railroad company might be tempted to give discriminatorily favorable treatment, to the prejudice of competing shippers. In brief, the railroad was to be prohibited from dealing as a carrier with itself as a shipper. In every case arising under the Commodities Clause, the real question would seem to be what "interest, direct or indirect," by a railroad company in commodities, or what exercise of authority by the railroad company over the production of commodities, is sufficient to require that their transportation by the railroad company be prohibited. In the light of the statutory purpose, it would seem to be obvious that the "interest" referred to is a sufficient financial interest of the railroad in the fortunes of the shipper to constitute an inducement to discriminate in favor of the shipper. The further prolfibition, against the transportation of commodities produced under the "authority" of the railroad company, would normally be considered to cover instances where both transportation and production were undertaken by the same financial or business group. In brief, the purpose of the Commodities Clause is to prohibit the production and transportation of commodities by the same business enterprise.

In the light of this statutory purpose, it seems plain beyond argument that transportation by one subsidiary of an affiliated subsidiary's products is prohibited. Every evil at which the Commodities Clause was directed is fully present in this type of situation. Where railroad and shipper are wholly-owned subsidiaries of a common parent company, both embody and act for the identical proprietary interest. Under these circumstances, the railroad has the same interest in commodities owned by the shipper that an unincorporated department of a business has in the profitable operation of other departments. The situation is further within the literal language of the Commodities Clause in that both transportation and production are in the hands of the same "authority"—i. e., the management holding company.

There is no magic in the corporate form which should obscure these realities. A corporation, it is now generally recognized, is simply a method of doing business. In many business enterprises, geographical and functional divisions have been established as wholly-owned subsidiaries. This has been done for a variety of legitimate reasons—limitation of liability, qualifying to do business in particular states, etc. The law has often recognized the separateness of wholly-owned subsidiaries from each other and from the parent company in such matters as the scope of tort and contract liability where it appeared that the affairs of the subsidiary were handled consistently

with the theory of a separate corporation—separate assets sufficient to meet its ordinary needs, separate books, careful observance of corporate ritual, etc. See, generally, Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations* 39 Yale L. J. 193; *Stevens on Corporations*, pp. 80–87.

However, the fact that under such conditions the law recognizes wholly-owned subsidiaries for purposes consistent with the corporation laws has not, except in cases under the Commodities Clause, been taken to mean that a public policy might be thwarted merely by the creation of subsidiary corporations. Rather, it has been held "that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was in the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U. S. 349, 363. The transportation of commodities as a common carrier by the same business enterprise that owns or produced the commodities is prohibited by the Commodities Clause. The crux of the Government's position is that such a dual enterprise, however conducted, is forbidden by that statute.

Considerations of the character set forth above were wholly ignored by the majority of the Court in the *Elgin* case. In lieu of any realistic appraisal of the facts before it, undertaken in the light of the purposes of the Commodities Clause, the majority drew a distinction between a holding company's "power of control" over its subsidiary

and its actual exercise of the power of control. Further, the Court indicated that the fact that the power of control was affirmatively exercised could be established only by proof of acts which disregarded the separate corporate form of the subsidiary. The majority predicated its opinion upon such findings of fact by the district court as those respecting Elgin's separate corporate existence and its ownership of property and conclusion of contracts in its own name (p. 503). The district court had further found that Elgin conducted its affairs in its own name in the usual form of a corporation and that communications between Elgin and its parent "were carried on in the form of transactions and communications between two separate and distinct corporations" (Elgin R. 498).[22] Moreover, when the holding company wanted information from, or action by, Elgin, it "never obtained such information or took such action directly by its own officer or agents, but always made request for such information or action through the officers of [Elgin], in the way which is customary and usual between corporations which are separate and distinct corporations" (Finding of Fact 11, Elgin R. 498).

We submit that mere observance of separate corporate ritual should be wholly immaterial in determining whether a Commodities Clause violation exists. Congress made plain on the face of

[22] Reference in this form are to the Transcript of Record in the *Elgin* case, No. 660, October Term, 1935.

that Clause that it wanted a divorcement of the functions of transportation and production in order to prevent the evils which, as this Court has recognized, inevitably flow from this combination. In providing that railroads should not haul goods in which they had an interest, Congress did not indicate that it desired only a divorcement in form. It is startling to suppose that the potential evils which produced the Commodities Clause would be any less present in the situation now under consideration because the railroad subsidiary is in form a separate corporation and this separateness in form has been ritually recognized by its parent. The dissenting minority of three members of this Court in the *Elgin* case noted (p. 506):

> Those familiar with present day methods of corporate control will not be so naive as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors.

We further submit that there is no valid basis for the distinction drawn in the *Elgin* case between the "power of control" and "exercise of the power of control." If the holding company does not exercise the power of control over its 100% subsidiary, then it is proper to inquire who does and how it can be done. Assuredly, the

power of control is exercised by those in whom it legally resides even in the act of temporarily relinquishing it to selected others.

A holding company which has no operating functions exists only for the purpose of exercising whatever control over its subsidiaries may be necessary to weld them into a single cohesive business enterprise. It must inevitably exercise its dominant power to guide and control, or what is intended as an efficient device for conducting a large-scale business will disintegrate through the subsidiaries' failure to cooperate to the advantage of the whole. Indeed, a holding company would be derelict in the discharge of the duty it owes its shareholders if it failed effectively to supervise and coordinate the activities of the subsidiaries.[22a]

No claim has been or could be made here that the Holding Company owns stock in its co-appellees for investment purposes only or that it was "a holding company which was content to hold." *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 523. Such an argument would not be compatible with the facts in this record or with an 100% ownership.

[22a] Accountants and businessmen would instinctively ignore the division of an integrated business enterprise into corporate segments. It has long been recognized that the affairs of an enterprise in the form of a holding company and subsidiaries cannot be comprehended without the use of consolidated financial statements, which reflect the aggregate enterprise, rather than the internal legal entities.

Speaking of a situation in which a holding company owned varying interests in subsidiaries, often less than 20%, and meeting an argument that the stock interest was held only for investment purposes, this Court said in *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 701:

> The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise.

The interest which the transporting subsidiary has in the products of its affiliate, and proof that both transportation and production are carried on under the same authority, are given concrete form by the facts apparent from the record respecting the Bethlehem organization. Obviously, Bethlehem may be viewed realistically only as a cohesive, integrated, large-scale steel producer. The Holding Company is not a mere investment trust—it is the top management and the integrating force for the entire enterprise. Subsidiaries are engaged in the mining of various types of iron ore in Chile, Venezuela, Cuba, and the region about the Great Lakes (R. 116–117). Other subsidiaries mine coal in Pennsylvania and West Virginia (R. 117). These raw materials flow to producing subsidiaries since Bethlehem prefers not to sell such materials to outsiders (R. 117–118). Of the prin-

cipal raw materials required by manufacturing subsidiaries of the Holding Company, 80% of the iron ore, 70% of the coal, and 56% of the limestone was obtained from other subsidiaries during the five-year period 1935–1939, inclusive (R. 157–158).

Iron ore is transported from South American points to the United States by a subsidiary steamship company engaged almost exclusively in such transportation (R. 116). A second ocean-going steamship company transports Steel Company products between the coasts of the United States (R. 114), while another shipping subsidiary carries from Upper Great Lakes points to Lackawanna most of the iron ore used there by the Steel Company (R. 113). The Bethlehem organization uses its own transportation facilities and its own steel and steel products whenever possible (R. 110–111, 113–114). No opportunity is lost to sell steel produced by the Steel Company to other subsidiaries (R. 112).

Any realistic appraisal of the Holding Company and its approximately 57 subsidiaries requires the conclusion that it is conducted as an integrated enterprise for the ultimate purpose of producing steel and steel products. South Buffalo has a limited but definite function as a cog in this organization—to provide transportation for the Steel Company's Lackawanna plant. There is no reason to believe that the Holding Company's ownership of South Buffalo is con-

tinued for a reason different than its ownership of the coast-wise steamship company. Operation of that company was admittedly based on problems arising from improper stowage or packing which the organization met in shipping its products, and the desire for more satisfactory service (R. 115). In the broad view, it is impossible to contend that South Buffalo has no "interest" in products of the Steel Company or that its transportation of those products does not flout the Congressional purpose to divorce transportation and manufacture.

In asking this Court to view realistically the operations of the Bethlehem organization, we do not ask it to adopt an approach in any way different from that of a leading Holding Company official. This official was McMath, a director of both the Holding Company and the Steel Company, a vice-president in charge of finances and legal matters of both (R. 104–105), an officer of "a number of these other companies" [i. e., Bethlehem subsidiaries] (R. 117), but never, he was quite sure, an officer or director of South Buffalo (R. 148).

McMath had constant difficulty, resulting from his use of the pronouns "we" and "our" to refer indiscriminately first to one appellee, then to another. This difficulty continued throughout his testimony despite repeated promptings by appellees' counsel. Frequently, "we" or "our" referred to the Holding Company (R. 121, 122–

123, 130).[23] Sometimes, these first person pronouns referred to the Steel Company (R. 111, 122–123).[24] Again, they might refer to South Buffalo (R. 125).[25] When he testified "we have important transportation business," he merely meant that the Holding Company owned stock in subsidiaries which were engaged in important transportation businesses (R. 149). When he spoke of "manufacturing departments" he did not mean the manufacturing departments of the Holding Company, which had none, but of the Steel Company (R. 146–147).

During the course of his direct examination by Government counsel, appellees counsel's interjection led to the following (R. 117):

> Mr. BROMLEY: When you say "we," each time do you mean the Bethlehem Steel Corporation? Will you make that clear in your answer?
>
> A. No, I don't—to be accurate. Being an officer of a number of these other companies, I use the word "we" in a pretty

[23] "Mr. BROMLEY: When you say 'we,' who do you mean?
"A. Bethlehem Steel Corporation. (R. 121.)
"Q. Who do you mean by 'we'?
"A. I should say Bethlehem Steel Corporation" (R. 130).

[24] "Mr. ADKINS: When you say 'our,' you mean Bethlehem Steel Company?
"A. Yes—Bethlehem Steel Company. (R. 122–123.)

[25] "Q. When you say 'our people'—do you mean the South Buffalo Railway people?
"A. Yes." (R. 125.)

broad sense without attempting to distinguish between ownership.[26]

The incongruity of a failure to recognize the essential unity of the Bethlehem organization and the inevitable domination of South Buffalo by its co-appellees is sharpened by the type of arguments advanced by them below. Instances of domination of South Buffalo by the Holding Company were repeatedly dismissed as "necessarily involved in the holding company form of corporate management."[27] The Government assertedly failed to recognize that there are "facts and relations necessarily growing out of the holding company set-up," many things in respect of South Buffalo's affairs it was "appropriate" for the Holding Company to determine in view of its stock ownership. As an example, the Holding Company was "entitled as stockholder to determine that it was for the advantage of its seven railroad subsidiaries as a matter of policy to operate under the same executive officers and management."

The same character of argument was advanced to explain away any showing of the close relations between South Buffalo and the Steel Company. Of course, it was argued, relations would

[26] In this instance it developed that "we have properties both in West Virginia and also in Pennsylvania" meant that the holding Company owned the mines in West Virginia and the shares of a subsidiary which owned the mines in Pennsylvania (R. 117–118).

[27] The quotations in this paragraph are from the brief of appellees below (pp. 34–36).

necessarily be close. The Steel Company was South Buffalo's largest customer and in the exercise of ordinary business judgment South Buffalo would endeavor to provide service as efficient as possible. This was a constant explanation of instances of special services rendered to the Steel Company not available to other and smaller customers.

We submit that this type of argument does not exculpate appellees. On the contrary, any relationship from which such arguments may be derived is a relationship which should be suspect under the Commodities Clause. Divorcement of railroad and shipper is not achieved when they maintain a legal relationship which entitles one to intermeddle in the policy affairs of the other.

C. *There is Nothing in the Legislative History of the Commodities Clause which Requires or Suggests the Propriety of a Contrary View.*— We have previously indicated that, in the first case involving the Commodities Clause to reach this Court (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366), the fact was that the several defendant railroads owned varying interests in coal companies, ranging from a small stock interest to complete stock ownership, and that the Government contended that any such stock ownership, however small, by a railroad company in a customer coal company involved a Commodities Clause violation. (*Supra*, pp. 30-31.) We have also indicated that this Court rejected the Govern-

ment's contention both on the basis of the constitutional questions such a construction would pose and in view of the legislative history of the Commodities Clause. With respect to the latter ground of decision, this Court said (p. 414):

> Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012–7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language

gives rise to the implication that it was not the purpose to include it.

This view of the legislative history was also expressed in *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 526–7.[28] Since the language of this latter case was quoted with apparent approval in *Elgin*, this interpretation of the legislative history must be regarded as a major factor underlying the decision there reached. It is noteworthy, however, that in the *Reading* case, *supra*, an argument predicated on the legislative history was not even alluded to by the Court in its opinion. In any event, examination of the legislative history reveals that it in no way evidences a Congressional understanding or intention that the common and complete ownership of railroad and shipper should be without the scope of the Commodities Clause.

The Commodities Clause (Section 1 (8) of the Interstate Commerce Act) was enacted as Sec-

[28] "But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a Corporation in which the Road held stock."

tion 1 of the Hepburn Act of 1906 (Act of June 29, 1906, 34 Stat. 585). It originated as an amendment offered by Senator Elkins in the Senate to the bill as passed by the House. Senator Elkins' amendment as adopted in Committee of the Whole (40 Cong. Rec. 6568) read as follows:

> From and after May, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier.

It will be noted that at this point the clause was in its present form, except that "common carrier" was to be changed to "railroad company" so as to exclude pipe lines, and the exception for timber and timber products had not yet been inserted.

A few days later, Senator Tillman, after referring to possibilities of evasion by corporate devices, introduced the following substitute for Senator Elkins' amendment (40 Cong. Rec. 7012):

> After May 1, 1908, it shall be unlawful for any common carrier to engage in the

transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested at the time, directly or indirectly, by stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such common carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders.

Senator Tillman's substitute amendment was rejected without any discussion (40 Cong. Rec. 7012).

Senator Tillman then stated that his proposal might be "dangerous" or "too strong"; he had

submitted it as a "drastic provision" with the expectation that it would be carefully considered and modified in conference. He thought that provision in the bill under discussion "while very broad, is also very loose." He continued (40 Cong. Rec. 7012):

> It may be wiser to wait a while and let the courts interpret the provision already in the bill. * * * I want to ask the Senate to incorporate in this provision, in line 7, page 6, after the word "indirect," the words "by partnership, stock ownership, or by any arrangement whatsoever." Thus the broad provision in regard to the public carrier being prohibited from transporting anything which it produces, will be broadened and more particularized by the words I have used.

This amendment was also rejected without discussion. 40 Cong. Rec. 7012.

These were the only amendments offered during the Congressional consideration of the Commodities Clause which had any relation to the issue of whether its prohibition is avoided by the use of corporate devices which in reality permit the combination in a single financial interest of the dual roles of carrier and shipper which is the target of the statute. It is extremely important to note that both of Senator Tillman's amendments went far beyond the question of whether the prohibition should extend to the interest of

a railroad company in the commodities of a shipper where both are wholly-owned subsidiaries of a common parent. His first amendment would have extended the ban of the Commodities Clause to the situation where an officer, director, or employee of a railroad company has a stock interest, no matter how small, in a shipper of commodities transported by the railroad. It would also have prohibited the transportation of any commodity by a railroad as to which the holders of more than 10 per cent of its capital stock are also "interested, directly or indirectly, in the business of buying or selling such article * * * or in the mines or factories producing the same." Senator Tillman's second amendment would have apparently prohibited a carrier from carrying commodities of a shipper if there was any connecting financial interest between the two companies, e. g., as by stock or partnership interests, no matter how small.

It is obvious, therefore, that the Senate's rejection of Senator Tillman's amendments cannot be interpreted as meaning more than that the Senate was unwilling to extend the ban of the Commodities Clause to situations where the relationship between railroad and shipper comprised no more than a minor stock interest of the one in the other or of a third person in both. The attention of the Senate was not focused on the situation where the shipper was a wholly-owned sub-

sidiary of the railroad, or vice versa, or where both shipper and railroad were wholly owned subsidiaries of a common parent. Furthermore, the fact that the Congress (and particularly the Senate) simultaneously left the prohibition of the Commodities Clause applicable not only to commodities produced or owned directly by the railroad, but also to commodities manufactured, mined, or produced "under its authority * * * or in which it may have any interest, direct or indirect," can only mean that by these phrases Congress intended to reach clear and obvious subterfuges, whether based upon the corporate device or otherwise.

In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, the application of the Robinson-Patman Act to a discriminatory pricing system resulting from adoption of a basing point method of pricing was before this Court. Petitioner there urged that the rejection by Congress of a proposed amendment to the Act which would have prohibited all basing point systems, indicated its intention to sanction all such systems as not in contravention of the Act. But this Court refused to read such meaning into the rejection of the proposed amendment; it considered that the legislative history indicated only that Congress left the legality of all such systems to be determined according as they might be within the language of the Act as adopted.

A similar conclusion is required here. Rejection of the Tillman amendments indicates at the most only a refusal to extend the prohibition of the Commodities Clause to every situation in which a railroad may be connected with a shipper by a stock interest, no matter how small. It does not mean that a relationship resulting from 100% common ownership of railroad and shipper was not intended to fall within the condemnation of the Clause. In fact, we are of the opinion that the legislative history is entirely consistent with the view that the Commodities Clause is applicable wherever a majority of the railroad's stock is owned by a holding company with producing subsidiaries whose goods are transported by the railroad. Certainly, if ownership by one person of all of the stock of both railroad and shipper is prohibited by the statute, nothing in the statutory language, purpose or history suggests that ownership of only 90% of the railroad's stock should be regarded as a relationship permitted by the statute. At the very minimum, only the existence of substantial minority holdings of the railroad's stock should be regarded as a sufficient safeguard against the possibility that the interests of the railroad as a common carrier may be subordinated to the other interests of the parent company and its producing subsidiaries.

Since the Commodities Clause was enacted in 1906, there have been repeated proposals to amend it. All of these proposals, so far as here relevant, resemble Senator Tillman's proposed amendments in that they would have extended the prohibition of the Commodities Clause to wherever a control relationship existed, e. g., to every situation where railroad and shipper were controlled by the same person even though through far less than *complete* stock ownership. Thus, during consideration of the legislation which became the Mann-Elkins Act of 1910, 36 Stat. 539, there was offered in the House, and rejected, an amendment to the Commodities Clause which would have prohibited a railroad from transporting commodities for a shipper where one-fifth or more of the capital stock of the shipper is owned by a corporation which also owns one-third or more of the stock of the railroad, or where one-half or more of the shipper's stock is owned by a corporation which owns one-fifth or more of the railroad's stock. 45 Cong. Rec. 5594–5595 (1910). In 1914, Representative Adamson introduced a bill to amend the Commodities Clause which, among other things, would have made it applicable wherever railroad and shipper had the same controlling stockholders or were "otherwise subject to the same control", a condition which is obviously met by far less than complete stock ownership. H. R. 20470, 63d Cong., 3d Sess.

(1914). This bill died in committee.[29] During the drafting of the Transportation Act of 1940, the Senate Committee on Interstate Commerce considered an amendment to the Commodities Clause which would have prohibited a carrier from transporting commodities manufactured, mined or produced under the authority of "subsidiary, affiliate, or controlling person of such carrier" or in which such subsidiary, affiliate, or controlling person had any interest. Confidential Committee Print No. 2, S. 2009, Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. (1939), p. 50. This amendment would, of course, have extended the prohibition of the Commodities Clause to every situation where there existed a control relationship between carrier and shipper—even though based upon less than majority stock ownership. This amendment was rejected by the Senate Committee as too drastic. Sen. Rep. 433, 76th Cong., 1st Sess. (1939), p. 15.

[29] Both the bill introduced by Representative Adamson and the suggested amendment to the Mann-Elkins Act would also have prohibited transportation even where the railroad did not have an interest in the commodities at the time of transportation but at one time had had an interest in the commodities as producer, miner, or owner. In the *Delaware & Hudson* case, *supra*, this Court had construed the Commodities Clause as applying only where the railroad had an interest in the commodities at the time of transportation. Cf. *United States* v. *Delaware, Lackawanna & Western R. Co.*, *supra*.

To summarize, since all of these proposed amendments to the Commodities Clause went far beyond the instant situation of carrier and shipper being wholly owned subsidiaries of a common parent, the failure of Congress to enact them is without significance here. In any event, the limited consideration which they received precludes their being viewed as evidence of legislative purpose. And see *Corn Products Refining Co.* v. *Federal Trade Commission, supra.*

II

THE EVIDENCE ESTABLISHES THAT THE HOLDING COMPANY EXERCISED ITS POWER OF CONTROL OVER SOUTH BUFFALO TO SUCH A DEGREE AS TO REDUCE IT TO A MERE DEPARTMENT OF THE BETHLEHEM ORGANIZATION

If this Court determines that the decision in *United States* v. *Elgin, Joliet & Eastern Ry. Co., supra,* enunciates principles of current validity, then the fact that both railroad and producer are wholly-owned by the same corporation does not of itself establish the railroad's interest in the producer's commodities. It is further necessary to establish by evidence that the power of control vested in the dominant company by virtue of stock ownership has been so affirmatively exercised as to reduce the railroad to an agent, department, or instrumentality of the producing interest. We will now demonstrate that the Holding Company's power of control was in fact exer-

cised to such a degree as to require the conclusion that South Buffalo, as a mere instrumentality of its co-appellees, had a forbidden interest in the commodities of the Steel Company which it transported.

Before proceeding to the facts of this case, we point out the inapplicability of decisions which consider for other purposes when it may be proper to disregard the corporate entity or "pierce the corporate veil."[30] The formal separateness of affiliated companies may be important of itself, even though "domination" of one by the other exists, as, for example, in determining whether jurisdiction may be obtained over a parent by serving process on its subsidiary. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333. On the other hand, this Court has disregarded the legal individuality of a railroad and its subsidiary wharfing company on very slight evidence of "domination," where the wharfing company was an integral unit of a single transportation system and its separate existence was used as a guise to charge discriminatory rates and avoid regulation by the Interstate Commerce Commission. *Southern Pacific Terminal Company* v. *I. C. C.*, 219 U. S. 498. See, also, *Chicago, M. & St. P. Ry. Co.* v. *Civic Ass'n*, 247 U. S. 490.

A. *Domination of South Buffalo prior to its Reorganization.*—The District Court found that

[30] See generally, Latty, *Subsidiaries and Affiliated Corporations*, particularly pages 156–165, 54–56.

for over sixteen years prior to about December 1939, "the Holding Company and the Steel Company in numerous ways and on numerous occasions so dominated South Buffalo as to effect a commingling of the identity and community of interest among South Buffalo, the Holding Company, and the Steel Company" (Fdg. 26, R. 914).[a] In our submission, this ultimate finding and the detailed, related findings upon which it rested, were amply supported and required by uncontradicted oral testimony and by documentary evidence.

The domination of South Buffalo (in the interest of its producing sister-subsidiary) flowed directly from the management theories of the Holding Company. Prior to 1940, South Buffalo and the other six railroad subsidiaries of the Bethlehem organization maintained principal offices in Bethlehem, Pennsylvania, located in the Steel Company's main building. At Lackawanna, New York, South Buffalo and the Steel Company were represented by resident managers, the office space of South Buffalo again being located in the Steel Company's building (Fdg. 17, R. 912). The testimony of the Holding Company's financial vice-president (McMath) indicates clearly that the organization regarded it as wasteful and improvi-

[a] In its conclusions of law numbered 4 and 5, the district court held that prior to 1939 South Buffalo's transportation of Steel Company products was in violation of the Commodities Clause in that it was so dominated by its co-appellees as to be their mere instrumentality (R. 922).

dent for South Buffalo to fail to take advantage of the readily-accessible talent available in the Steel Company's organization.

McMath's testimony is filled with passages of which the following are indicative: "those [steel] plants had fully developed and well-trained organizations, engineering talent, and I guess capable of doing almost anything" (R. 123); "you had in Buffalo a large [steel] plant, a large engineering organization, that was close to the job" (R. 125); "on certain matters the steel company engineering organization could do a better job than the railroad company could for the simple reason that it takes money to hire talent" (R. 126); "I always recognized that it was the sensible thing to do [for South Buffalo] to get the benefit of their [the Steel Company's] advice and help" (R. 126); it was "sensible and wise * * * from the viewpoint of economy to get the benefit of a trained organization in the steel plant" (R. 126). As a consequence of this view, the Holding Company expected South Buffalo to seek the advice of the Steel Company and to follow it, at least where it was good advice as would be expected (R. 126).

His testimony at times took the form of virtual admissions that the relations among appellees violated the Commodities Clause prior to 1940. He testified that the local managers of the Steel Company at Lackawanna "were at times called

upon, called upon from time to time, for advice and assistance" by South Buffalo, and that "I am not sure that at times, perhaps, even greater reliance might have been put upon the plant managers in the early days than would now be regarded as proper or as required by the Commodities Clause" (R. 124). In view of the Steel Company's large organization, South Buffalo was "naturally relying to some extent upon the advice and assistance from the managing departments of the steel plant" (R. 125). The relations between South Buffalo and the Steel Company at Lackawanna were such "that there were certain things which had happened which might possibly be within the language, at least of the minority decision," of this Court in the *Elgin* case (R. 125).[n] In summing up the degree of control exercised over South Buffalo by the Steel Company, McMath testified that "there were instances where the theory of management had, to some extent, slopped over" (R. 125).

The counterpart to the testimony of this important official of both the Holding Company and the Steel Company was provided in the examination of Entwisle, general manager of the Steel Company's Lackawanna plant continuously from 1936 to the time of trial (Ex. 149, R. 818). He

[n] In response to a question whether there was danger the relations of the two subsidiaries might run afoul of the majority opinion, McMath testified: "Well, there was some language in the majority opinion, yes, that possibly we had to take into account." (R. 127.)

admitted exercising supervision over South Buffalo

> to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad [Ex. 149, R. 819].

He was interested in increasing the operating efficiency of South Buffalo as well as the Steel Company since both were owned by the Holding Company (Ex. 149, R. 820). "You can call that a big brother attitude, if you want to" (Ex. 149, R. 820).

The testimony of these officials indicate both the basis upon which it was deemed expedient to require supervision of South Buffalo's affairs by the Steel Company and to some extent the scope of this supervision. The extensive sweep of the supervision actually exercised over South Buffalo is more particularly depicted by the documentary exhibits which are in evidence. These documents are several score letters covering a period from 1923 until 1940 exchanged between South Buffalo and the Steel Company.

Before considering the content of these letters, we point out that their form alone sufficientl-

indicates that South Buffalo's independence was completely obliterated by the Steel Company's supervision. As the District Court found, many letters were written by officials of South Buffalo to officials of the Steel Company, addressing them as officials of South Buffalo.[33] Gross, a vice-president, director, and general traffic manager of the Steel Company, addressed letters written on South Buffalo stationery both to South Buffalo officials and other officials of the Steel Company which purported to be signed by him as an official of South Buffalo.[34] (Fdg. 27, R. 915.) Clearly, this usurpation by Steel Company officials of important managerial offices of South Buffalo refutes any notion of the separateness of these two corporations.

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[33] Burns, general manager of the Steel Company's Lackawanna plant until 1936, was addressed as "General Manager, South Buffalo Railway Company" in exhibits 26, 40, 42, 46, 48, 50, 53, 54, and 55. Entwisle, successor to Burns as general manager of the Steel Company's Lackawanna plant, was similarly addressed in exhibits 56, 60, 61, 62, 63, 64, 65, 67, 68, 70, 72, and 76. Gross, a vice-president, director, and general traffic manager of the Steel Company was addressed as "G. T. M." or "General Traffic Manager" of South Buffalo in exhibits 30, 34, 36, 37, 38, and 39.

[34] Examples of letters of this type to other officials of the Steel Company are exhibits 121, 122, 124, 125, and 127. Examples of such letters to officials of South Buffalo are exhibits 21 and 23.

There is no correspondence in the record from the Steel Company's Lackawanna plant manager, probably because South Buffalo's requests were answered verbally (Ex. 149, R. 826).

These letters exchanged by South Buffalo and the Steel Company are almost uniformly requests for advice by South Buffalo and responses by the Steel Company. They fully support, apart from confirming oral testimony, the finding of the District Court that South Buffalo applied to the Steel Company "for guidance, advice, and decisions in respect of South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of equipment, and construction of additions and extensions" (Fdg. 26, R. 914). The court also mentioned in its findings as additional South Buffalo problems which were the subject of Steel Company advice matters such as the purchase of locomotives, the construction and enlargement of buildings, the location of a floodlight, and the propriety of office forms to be used by South Buffalo. Referral by South Buffalo of these problems was in terms of "I would ask your judgment"; "What is your view of this matter"; "Kindly advise your wishes"; and "We would appreciate your advice" (*ibid.*). While letters from South Buffalo to the Steel Company substantially outnumber replies, the reason for this is apparent from the court's further finding that South Buffalo's requests for instructions addressed to the Steel Company's Lackawanna plant manager were at times answered by him verbally (Fdg. 27, R. 915).

We do not consider it necessary to set forth extensively the content of the exchanged correspondence. As a significant example of the manner in which the Steel Company usurped South Buffalo's management function, we call attention to the manner in which a customer's request for a reduction in South Buffalo's charges was handled. Seneca Iron & Steel Company wrote to South Buffalo setting forth detailed reasons why it thought that the existing intraplant switching charges of South Buffalo should be halved (Ex. 29, R. 703). South Buffalo's general manager immediately relayed this request to a Steel Company vice-president (addressing him as an officer of South Buffalo) and inquiring "Do you wish to make a special rate for this service?" (Ex. 30, R. 705). The Steel Company's response to South Buffalo (on stationery of South Buffalo) announced that "*We* are not in a position to take any action in reducing *our* local switching rates" though "*we* appreciate the merit of some of the arguments as outlined in this shipper's complaint" (Italics added) (Ex. 31, R. 705). South Buffalo then wrote to the Seneca Company that its request for a reduction in switching charges "has had the earnest consideration of this Management, and while it is realized from your point of view a reduction is desirable, it is a source of regret that it is not consistently possible. * * * I am sorry your request cannot be acceded to" (Ex. 32, R. 706).

We submit that this correspondence discloses a flagrant example of the precise type of evil which the Commodities Clause was designed to strike down. The request of South Buffalo's customer for a lowered rate is rejected, not by the railroad whose primary interest may be to keep its customer in business, but covertly by a competing producer whose primary interest may be the elimination of its competitor. There is obvious prejudice to the public interest in the maintenance of a free competitive system which the Commodities Clause was designed to foster. In this case the District Court found that the Steel Company subsequently purchased the plant of the Seneca Company (Fdg. 26, R. 915).

Among other examples of the type of inquiry addressed by South Buffalo to the Steel Company, we enumerate the following: In Exhibit 36 (R. 709), after detailing that a structure of a customer encroached on South Buffalo property, the inquiry is in terms of "I would ask your judgment as to our obligations as a carrier in these conditions"; in Exhibit 48 (R. 720), a contemplated sale of land to South Buffalo's customer, Republic Steel Corporation, was placed before the Steel Company's Lackawanna plant manager to "advise what policy should be adopted";[35] in Exhibit 55 (R. 727), South Buffalo

[35] The Lackawanna plant manager considered it necessary to refer this problem to the Steel Company's manager of real estate in the home offices at Bethlehem, Pa. (Ex. 49, R. 721).

asks whether it should take legal action in an effort to modify an injunction governing the elevation of one of its grade crossings; in Exhibit 56 (R. 728), the Steel Company is asked whether it desires South Buffalo to hold a contemplated meeting with representatives of South Buffalo's enginemen's group and whether a specified wage vote for locomotive helpers is satisfactory;[36] in Exhibit 63 (R. 733), South Buffalo requests permission from the Steel Company to acquire from another railroad a flue repair shop which is "offered to us for $1,500 which we consider cheap"; in Exhibit 64 (R. 734), South Buffalo requests Steel Company advice on a proposed track acquisition from Nickel Plate railroad.

Fully indicative of the status of South Buffalo as a mere department or instrumentality of the Bethlehem enterprise is a memorandum prepared by the Steel Company's Lackawanna plant manager addressed jointly to the President and Superintendent of South Buffalo and to the person (Clarke) in charge of the Steel Company's own standard and narrow gauge railroad system (Ex. 25, R. 699). In this joint memorandum all are taken to task and required to report because in a "comparative statement of the transportation costs

[36] Exhibits 57 (R. 729) and 62 (R. 732) are further illustrations of Steel Company determination of South Buffalo personnel and wage problems.

of all steel plants * * * Lackawanna plant looks very much out of line." South Buffalo's vice-president responded, addressing the Steel Company's plant manager as "General Manager, South Buffalo Railway Company" and sending a copy to Clarke (Ex. 26, R, 700). In his response, South Buffalo's vice-president gave a detailed explanation of costs, saying among other things "So far as the South Buffalo is concerned I will say that its charges are below cost," and giving several "fair samples of special service."

While up to this point we have thrown primary emphasis on domination of South Buffalo by the Steel Company, this merely fortifies its further dominance by the Holding Company. For it was the Holding Company, because of the management theories it entertained, which required South Buffalo to apply to the Steel Company for guidance. The domination of South Buffalo by its co-appellees is in reality nothing other than its absorption into the Bethlehem organization. This is reflected by the District Court's ultimate finding that a commingling of identity and community of interest existed among appellees, which it predicated upon specific evidentiary findings as to the manner and methods whereby South Buffalo was "dominated" by its co-appellees.

As one example of direct domination by the Holding Company of South Buffalo in the period prior to 1940, we point to the two contributions

made by the Holding Company to South Buffalo, the facts of which are set forth, *supra*, pp. 16–18. We call attention to the manner in which the Holding Company initially determined, without any consultation with South Buffalo, that it was desirable that the latter's books reflect a more solvent financial condition. To that end, the Holding Company contemplated that South Buffalo would increase its outstanding capital stock from $500,000 to perhaps as much as $3,300,000, or more than a 550% increase (Ex. 131, R. 780). The Holding Company's counsel wrote to its financial vice-president (McMath) (Ex. 131, R. 780), enclosing a form of letter agreement respecting South Buffalo's share issuance to be sent to if by the Holding Company. Such a letter agreement was sent and executed, providing for South Buffalo's issuance of $1,900,000 in stock (Ex. 132, R. 781).[37] Later, the Holding Company's counsel discovered an obstacle which he called to McMath's attention (Ex. 133, R. 782), who then considered it preferable to postpone indefinitely South Buffalo's issuance of stock

[37] The letter, forwarded to South Buffalo by the Holding Company, commences:

> We understand * * * you desire to issue * * * $1,900,000 par value of shares * * * we desire to acquire the additional shares * * * we write this letter to evidence the agreement * * *. We have been advised by counsel [the proposal] is entirely within the law and that you should be able to accomplish it in due course. (Ex. 132, R. 781.)

(Ex. 134, R. 783). A letter agreement effecting such a postponement was then executed (Ex. 135, R. 784).[38]

Assuredly, a corporation which has no voice in determining whether its capital stock shall be virtually quintupled cannot assert its independence. The District Court found that South Buffalo took no part in any action leading to this transaction, though it appeared that one South Buffalo officer was advised of the Holding Company's general purpose (Fdg. 25, R. 914). This officer was Trageser, then South Buffalo's president, whose testimony clearly reflects that he was not consulted but was merely generally advised by Holding Company officials as to what the Holding Company intended to have South Buffalo do (R. 198).[39]

Before passing to a consideration of the reorganization of 1939, we point out that the account previously given of relations among appellees prior to the reorganization is not exhaustive of

[38] Payment for the proposed stock was made by the Holding Company to South Buffalo coincident with the Holding Company's forwarding to South Buffalo the original proposed letter agreement (Ex. 132, R. 781).

[39] The loose manner of dealing between South Buffalo and the Holding Company consequent on their close relations is further depicted by Exhibit 129 (R. 776). This exhibit discloses that South Buffalo, which prior to 1936 had paid no interest on its open-account indebtedness to the Holding Company, then aggregating over $2,000,000, undertook thereafter to pay interest to the Holding Company under certain conditions.

what the record discloses. A primary method whereby domination is now and always has been maintained over South Buffalo results from the type of management with the Holding Company has provided for it, a point which we consider in connection with the "reorganization." Furthermore, there were certain practices and elements of control which continued unchanged through the period of reorganization and of which we shall treat in considering the post-reorganization relations among appellees.

B. *Domination of South Buffalo as Evidenced by the "reorganization."*—In the Government's view, the managerial reorganization of South Buffalo, climaxed in the action of December 5, 1939, serves merely to illustrate further the control exercised over South Buffalo by its parent. Both the manner in which the "reorganization" was effected and the results it produced, disclose fully that South Buffalo has been considered and operated by the Bethlehem reorganization as a service appendage to further its primary function of producing steel and steel products.

The essential facts relating to the reorganization, set forth *supra*, pp. 18–23, are not in dispute, nor do we challenge any finding of the District Court on this aspect of the case. We do disagree with its conclusion that the reorganization terminated appellees' prior violation of the Commodities Clause and that, since it was undertaken "in

good faith," determination of a Commodities Clause violation should be reached by considering only the post-reorganization relations among appellees. We do not believe that there is any issue of "good faith" involved nor do we believe that the managerial reorganization of 1939 created any substantial alteration or recasting of relations among appellees.

In no event was it proper for the district court to disregard the evidence of practices among appellees prior to 1940 in reaching its final conclusion. In considering an analogous problem, this Court has recognized that "the effects of long practice persist." *N. L. R. B.* v. *Southern Bell Co.*, 319 U. S. 50, 57. There, the Labor Board's conclusion that Southern Bell was dominating and supporting a union in 1941 was met by the argument that, irrespective of any domination prior to 1936, a "reorganization" of the union at that time resulted in its independence. But this Court pointed out that the "reorganization" was guided by the principal officers of the existing union and that the vice-president of the old became the president of the new. Domination of the union prior to 1936 was held proper evidence for the Board to consider in reaching its determination as to the situation in 1941, both in view of the continuity of the organization and in view of the recognized tendency of prior practices to persist.

Considerations of this character persuasively indicate that the District Court erred in holding that the relations among appellees were substantially altered by the events of December 5, 1939. Under any realistic view, the Holding Company did not even intend any basic alterations of relations between its producing and transporting branches. It attempted to escape the impact of the Commodities Clause in order that those relations might continue. At the same time that it sought to give South Buffalo the appearance of independence by the selection of five "outside" directors, it was at equal pains to assure that South Buffalo could continue its primary function of serving the Steel Company effectively. This was accomplished primarily by the installation of Petty as South Buffalo's president.

Two basic contradictions in the position of appellees with respect to the reorganization are immediately apparent. In the first place, the reorganization itself, the result of which is asserted to be South Buffalo's independence, was determined upon and carried through by the Holding Company acting alone, and in obvious and complete dominance of South Buffalo. The possible impact of the *Elgin* decision upon South Buffalo's activities was discussed among top Holding Company officials and they, with the Holding Company's counsel, determined both that a reor-

ganization should be undertaken, and its extent and form. The new president of South Buffalo was decided upon when the Holding Company's president approved the recommendation of lesser Holding Company officials; his salary for service as president of South Buffalo and the other six subsidiary railroads was fixed by the Holding Company's president (R. 140–141, 237–238).

A second contradiction stems from a further action of the Holding Company when, as a result of their investigation of South Buffalo's affairs, it became apparent that "the theory of management, to some extent, had slopped over." As the District Court found, the Holding Company then instructed officials of the Steel Company that they should no longer instruct South Buffalo (Fdg. 30, R. 916). The proof that the Holding Company issues no instructions to one subsidiary is thus strangely bottomed upon the basis of instructions it issued to another.

The major vice of the district court's assessment of the effect of the reorganization consists, we believe, in its assumption that actual exercise of the power of control over a subsidiary may be established only by evidence disclosing constant supervision of its affairs. An equally effective domination of the subsidiary may be achieved by a conscious policy of staffing it with personnel whose background, developed loyalty, and hope of reward, assure their devotion to the parent.

Precisely this was recognized by the Court in *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, where, in connection with a determination of the constitutionality of § 11 (b) (1) of the Public Utility Holding Company Act of 1935 (49 Stat. 803), the question arose whether the Commission was justified in treating North American as possessing domination or the power of domination over certain subsidiaries in many of which it held much less than a 100% stock interest (in one, only a 17.71% interest in the common stock). This Court, after noting that North American's active intervention in the affairs of subsidiaries had been of "limited character," continued (pp. 692–693):

> This lack of active intervention, however, is indecisive. It appears to have resulted in large part from North American's satisfaction with the local managements of the subsidiaries and from the fact that the local managements have often included men selected by or historically related to North American. See *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. (2d) 730, 734–735; *Pacific Gas & Electric Co.* v. *Securities & Exchange Commission,* 127 F. (2d) 378, 383–384. The Commission was thus warranted in considering the harmonization of local policies with those of North American as a fact, the absence of conflicts making affirmative action by North American unnecessary. But it does not

follow that North American's domination of its system was any less real or effective. Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. See *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 491–492; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 307–308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146. In light of the extensiveness of North American's holdings of the securities of its subsidiaries and the penetration of local managements with men of North American background, the Commission was justified in treating North American as possessing domination over its subsidiaries or the power to dominate them when and if necessary.

That the Holding Company has always pursued the conscious policy of staffing South Buffalo with personnel from the Bethlehem organization is an inescapable conclusion from the evidence. Exhibit 20 (R. 696), setting forth the executive officers and chief operating officials of South Buffalo from 1922 to 1944, indicates which of these persons were former employees of the Steel Company. With occasional exceptions, officers of

South Buffalo have always been drawn from among Steel Company personnel. Of those who were officers at the time of trial, the president, both vice-presidents, the general superintendent (who was one of the vice-presidents), the secretary-treasurer, the auditor, the purchasing agent, and the chief engineer were all former Steel Company employees. The assistant secretary-treasurer, perhaps the least important officer, alone was not.

The record in respect of the three principal officers discloses the following:

1. *Petty,* president of South Buffalo since 1940, and whose three predecessors as president were all former Steel Company employees, was a Steel Company employee from his graduation from college in 1909 until he assumed South Buffalo's presidency (R. 236). He was in the electrical department of the Steel Company until 1919 and from then until 1940 he worked in the service department of the Steel Company's Bethlehem plant (R. 236). While in Bethlehem for a long period beginning in 1921, he knew and frequently worked with Entwisle, the man who from 1936 to the date of trial was the Steel Company's Lackawanna plant manager (R. 242). When Petty was made president of South Buffalo, he simultaneously became president of the Holding Company's other six railroad subsidiaries. His office is in Bethlehem, Pa. (R. 239–240).

2. *Trageser,* vice-president since 1940, was an employee in the traffic department of the Steel Company from 1917 to 1933 (R. 185). During all this time Trageser worked with and under Gross, the Steel Company's general traffic manager. Trageser became president of South Buffalo and the other subsidiary railroads in 1933.[49] At that time he dealt with McMath and Gross, but not with any directors of South Buffalo, in connection with his candidacy and his salary. In 1940 Trageser stepped down from the presidencies of the railroads to make room for Petty in compliance with suggestions from McMath (R. 185–187, 218–220). At the time of the trial, he was also vice-president of the other six railroad subsidiaries.

3. *Dullenkopf,* a vice-president and general superintendent since 1943, had been an employee of the Steel Company for 24 years. He then served as vice-president and superintendent for 11 years for another subsidiary railroad of the Bethlehem organization (R. 319).

Of the other South Buffalo officers, *purchasing agent Maguire,* elected by the boards of South Buffalo and of the other six subsidiaries about December 1, 1942, had been an employee of the

[49] Trageser's reported testimony at one point (R. 185) that he become president of South Buffalo in 1938 is probably a transcription error. The record is otherwise clear that he became president in 1933 (see, e. g., R. 187; Ex. 20, R. 696; Ex. 79, R. 745).

The same looseness characterized the manner in which South Buffalo and the Steel Company handled the determination of demurrage. At times South Buffalo assessed too much and at times too little. The district court found that prior to 1940 South Buffalo failed to assess demurrage properly owing, and that "there was a want of distinction in the use of tracks of South Buffalo and those of the Steel Company in the dealings between them in certain instances" (Fdg. 29, R. 916). This part of the finding was clearly supported and required by the evidence (R. 373–374). But the district court concluded that existing practices were changed since 1939 and "it is not claimed that there has been any violation of the demurrage tariff since then." This portion of the finding is manifestly erroneous since we did and do claim further violations of applicable demurrage tariffs. The testimony disclosed that until 1942 South Buffalo and the Steel Company computed demurrage under an agreement between them the effect of which was: loaded cars, consigned to the Steel Company from interchange, or consigned to interchange by the Steel Company, were considered to be on Steel Company tracks from interchange to interchange (R. 375–376, 616). This, of course, resulted in overcharges to the Steel Company since cars were on demurrage from inbound to outbound interchange. This agreement was in violation of filed tariffs [*] which

[*] The demurrage tariff is included in Exhibit 155, R. 854.

may not be altered by private adjustment. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Lowden* v. *Grain Company*, 306 U. S. 516.

A significant incident occured in 1943 when the Interstate Commerce Commission, owing to the stoppage of production of bituminous coal, issued its so-called "Coal Freeze Order." The order, effective June 1, forbade any railroad to deliver bituminous coal to a consignee having more than a ten days' supply on hand, but permitted the delivery of coal (regardless of the fact it was consigned to other) to persons who certified they had less than a ten days' supply on hand (Ex. 144, R. 798). South Buffalo had on its track over 250 cars of coal, mostly consigned to the Steel Company, but the Steel Company had more than a ten days' supply on hand (R. 326, 333-334). Though congestion resulted interfering with South Buffalo's operations, it made no attempt to ascertain if other coal consumers on its line needed coal (R. 335, 340-341).

In Finding 43 (R. 919), the district court correctly pointed out that South Buffalo was not under any legal obligation to ascertain if other consumers needed coal, and from this fact considered that South Buffalo's inaction had no significance. We think the incidence is of striking significance in illustrating in what unusual ways a carrier may inconspicuously and by mere non-action confer

possibly vast benefits on an affiliated producer. The incident takes on added significance in the light of the fact that South Buffalo customarily undertook to hold about a three days' supply of coal on hand for the Steel Company to protect it against mine shut-downs or transit delays (R. 372).

A persuasive inducement for Holding Company officials to exert supervision over its subsidiaries is achieved by the adoption of plans for incentive compensation to key personnel of the Holding Company. The Holding Company's certificate of incorporation provides for special incentive compensation to "executives of the Corporation," heads of departments having general control of matters affecting it and its subsidiaries as a whole, and Holding Company directors employed either by the Holding Company or any of its subsidiaries. This plan is based on total earnings of the Holding Company available for dividends on its common stock. (Fdg. 21, R. 913; R. 132.) Further, the Holding Company's certificate of incorporation grants it discretionary power to approve plans for incentive compensation to officials of subsidiaries, and the Holding Company has in fact approved a plan under which South Buffalo operates and under which its officials receive a portion of its income (Fdg. 21, R. 913).

The District Court, after making the foregoing finding of fact, added that "neither plan evi-

dences domination by the Holding Company." We submit that this conclusion from the facts is erroneous. As to the Holding Company plan, clearly its operation discloses the integration of the Bethlehem organization. The large sums Holding Company executives have received as incentive compensation is made to depend on the results of all operations. As to South Buffalo, the Holding Company's power to approve or reject a plan for it is an immediate element of control of obvious importance.

The District Court found that the Holding Company had relief plans and pension plans, both of which were available generally to employees of the Holding Company and its subsidiaries (Fdg. 22, R. 913). While the existence of such plans may not establish domination of South Buffalo, they are further evidence, fortifying a conclusion otherwise required, that the Bethlehem organization is operated as an integrated whole.

D. *The Control Exercised over South Buffalo since 1940 is more Pervasive and Effective than the Control Exercised over the Railroad in the Elgin case.*—The domination of South Buffalo by its co-appellees and its essential integration into the Bethlehem organization present a picture far more striking than was depicted in the *Elgin* case. In primary outline, the cases are identical since in *Elgin* also a holding company (United States Steel Corporation) owned all the stock of a railroad

Steel Company for a total of 18 years, commencing in 1914 with but two interruptions of service (R. 591–592; Ex. 20, R. 696). His four predecessors in office all had been former Steel Company employees. *Dalziel, chief engineer* of all seven railroad subsidiaries including South Buffalo since June 1940, was a Steel Company employee at the Lackawanna plant for "quite a few years * * * ten or more" (R. 597). Dalziel replaced James, a regular Steel Company employee who from 1922 to 1940 gave a small part of his time to South Buffalo,[a] the latter paying the Steel Company an agreed monthly amount for his services (R. 194–195). *Fatzinger, auditor* of all seven railroad subsidiaries since 1932, and *Sellers, secretary-treasurer* of all subsidiaries and of South Buffalo since January 1940, were both prior Steel Company employees whose length of service as such does not appear (R. 275; Ex. 20, R. 696). *General Agent Handwerk* assumed that position for the seven subsidiaries in 1934, having previously been in the employ of one of them since 1917 (R. 280).

These men would be more than human if, in view of their long-existing loyaltics, their areas of special skill and the manner of their selection as officers of South Buffalo, they were able to approach the problems of South Buffalo as railroad-

[a] South Buffalo retained DeWitt, a Steel Company employee, as its employment manager until at least 1940 under the same type of agreement (R. 192–193).

ing problems. Their whole experience suggests their necessary conception of South Buffalo as an adjunct to the primary function of the Bethlehem organization to produce steel. They are Bethlehem men; they rise and fall in the Bethlehem hierarchy, as Trageser did, dependent wholly on the organization's determination. Inevitably Bethlehem's whisper is their command.

Moreover, the officers of South Buffalo did not have its affairs as their exclusive concern. With the exception of Dullenkopf, the seven officers of South Buffalo above enumerated all hold similar offices in six other railroad subsidiaries of the Bethlehem organization (Fdg. 18, F. 912; R. 597). This factor is of obvious and vital significance in appraising the relationship of South Buffalo to its co-appellees.

The management reorganization of South Buffalo resulting from the meeting of December 5, 1939, served to heighten the extent to which Bethlehem men have been placed in charge of South Buffalo, and to underline the Holding Company's essential purpose that South Buffalo should serve as an integrated cog in the steel-producing organization. The selection of Petty to serve as president of the seven subsidiary railroads is particularly striking. He had never been a railroader, having only such knowledge of railroad operations as he gained in 30 years employment with the Steel Company. He was selected for the par-

ticular reason that he was fully familiar with Steel Company operations and without regard to his lack of experience in railroad problems. The installation of Sellers, a Steel Company employee, as secretary-treasurer to replace Craig, not a former Steel Company employee, who was demoted to assistant secretary-treasurer, was the second essential move in assuring that South Buffalo would have a thoroughly indoctrinated management.

Appellees will doubtless urge, as they did below, that the background of South Buffalo's executive officers is not significant since its affairs were in the hands of an independent board of directors. As part of the 1939 reorganization, the Holding Company's prior policy of electing only officials and employees of the Steel Company or South Buffalo to the latter's nine-man board of directors was abandoned. Five businessmen of the Buffalo area, having no connection with the Bethlehem organization, were elected and installed while the other four directors continued to be officers of South Buffalo. We have set forth, *supra*, pp. 22-23, the manner in which outsiders were solicited for the purpose.[42]

[42] The testimony of Gale, a vice president of a Buffalo bank, illustrates how these directors were chosen. The president of his bank told him that South Buffalo had come to the bank saying it desired a local representation on its board and asking if the bank cared to name a man to go on the board.

The record discloses that these outside directors, in terms of actual impact on the conduct of South Buffalo's affairs, were ciphers. With a single possible exception (the declaration of a dividend in which the Holding Company is not primarily interested (Fdg. 24, R. 913)), the directors at all times voted unanimously to follow recommendations made to them by Petty or Trageser. They were all unaware of the background of Petty and Trageser and unaware of the circumstances which caused them to be placed on the board.[42] Under the circumstances it is not to be anticipated that men who attend a few meetings a year can play any significant part in altering the established pattern of South Buffalo's conduct.

Of course these outside directors, all of whom were called by the Government, testified in response to questions on cross-examination that they followed the recommendations of Petty and Trageser only because they believed them to be good recommendations and that they independently exercised their judgment as directors of

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The bank president asked Gale if he would be willing to serve and he said he would (R. 465–466).

[42] When Dullenkopf was recommended to the board as general superintendent by Petty, he told of Dullenkopf's experience with another railroad but board members could not remember that any mention was made of the fact that for twenty-four years Dullenkopf had been an employee of the Steel Company (R. 482–483, 501–502).

South Buffalo (See, e. g. R. 456–457, 471).[44] But balanced against such testimony was the fact as to what they did. And what they did obviously in no way hindered, impeded, or affected the manner in which Petty and Trageser, the men selected for the purpose by the Holding Company, conducted the affairs of South Buffalo.

The directors were strangely lacking in all knowledge that their officers were prior employees of the Steel Company. Repeatedly they were asked whether they knew that Petty, Trageser, the secretary-treasurer, or some other officer of South Buffalo was a former employee of the Steel Company. We count a total of 22 questions of this type and in every instance the answer was negative.[45] No director showed any awareness of the basic reason why he was chosen.

C. *Domination of South Buffalo After the Reorganization.*—The effective control maintained over South Buffalo since 1940 has been primarily a

[44] The testimony of Director Fiske on cross-examination by Appellees' counsel suggests the worth of this type of testimony and how easily in practice the "outside" directors have been led (R. 503–504):

Q. Do you accept propositions put forward by Mr. Petty and Mr. Trageser merely because they are recommended by them?

A. No.

Q. What do you do, if anything, about exercising your own judgment on the matter?

A. Well, we raise a great many questions, but usually the case is laid out very logically as to what is to be done, what it is to cost and what is to be saved or what is to be accomplished by the change.

[45] R. 451, 453, 467, 468, 481, 482, 483, 489, 490, 501, 502.

result of the "penetration of its management" previously effected. Of course, there is no such documentary evidence as covered the period from 1923 to 1939 when South Buffalo's officers were required constantly to seek the Steel Company's advice. It was precisely to avoid this that the Holding Company installed Petty as president. In providing a highly-qualified president for South Buffalo, one thoroughly familiar with steel operations and selected for that reason, it became unnecessary for South Buffalo constantly to inquire how it might best serve the Bethlehem organization's interests.

The physical facts governing the relationship between South Buffalo and the Steel Company were not altered. Exactly two-thirds of South Buffalo's trackage, or 58 miles of its 87-mile total, is located within the Steel Plant's enclosure, and 70% of its total revenues derive from the Steel Company. The intermingling of track within the steel plant enclosure commenced when the Bethlehem organization acquired the Lackawanna facilities in 1922 and caused to be conveyed from the Steel Company's predecessor to South Buffalo most of the trackage which it now operates within the enclosure."

" Ownership of the maze of tracks within the plant enclosure could be determined only by reference to maps prior to 1941 at which time ownership tags were placed (R. 311, 313-314). A booklet prepared by South Buffalo labeled "South Buffalo Railway Company, List of Sidings" includes the trackage and sidings of both South Buffalo and Steel Company without discriminating between ownership (Ex. 12, not printed).

Finding 44 (R. 920) of the district court described the operations of South Buffalo within this enclosure. South Buffalo moves the pig iron in moulten form from the blast to the open hearth furnaces and also moves slag to the slag dump. The Steel Company itself usually moves the raw materials to the blast furnaces, and the ingots from the open hearth furnaces to the slopping pits. South Buffalo performs its part of the intra-plant switching pursuant to a schedule posted by the Steel Company showing the times when the blast furnaces are supposed to cast and the destination to which the molten metal is to be moved. The district court expressly found that there was evidence that at times the posted schedules were not closely followed and that South Buffalo engines and crews stood by waiting, sometimes for a considerable period of time. It concluded, however, that, "considering the nature and volume of work," no abnormal condition or coordination showing control of South Buffalo was disclosed.

We urge that this conclusion was manifestly erroneous. The degree of coordination in the producing operations is, of itself, abnormal. South Buffalo serves Republic Steel Corporation, but the service consists of delivering and receiving cars at one place (R. 569, 626–627). Republic owns the 18 miles of trackage within its plant enclosure and performs itself the intricate intra-

plant switching in the operation of its steel plant (R. 565–566). Some of the line haul carriers provide terminal switching service for steel manufacturers in the Buffalo area, but they perform no intra-plant switching for a steel manufacturer in any way comparable to that rendered by South Buffalo to its affiliate (R. 673 681, 686).

We believe the District Court should have concluded from the history of relations between South Buffalo and the Steel Company, from the manner in which South Buffalo assisted in the steel manufacture operations, and from the physical facts of South Buffalo's trackage relationship to the Steel Company's furnaces and hearths, that the Steel Company inevitably dominates and controls South Buffalo's operations.[47] Particularly would this conclusion be necessary in view of the fact that evidence respecting the day-to-day coordination of operations lies peculiarly within the province of the appellees. Yet there was ample concrete evidence of this coordination of effort to suit the Steel Company's convenience, beyond that found by the District Court.

[47] The testimony of Jacobs, assistant to the Steel Company's general manager at the Lackawanna plant, suggests the inevitability of keying South Buffalo's operations to the Steel Company's need since the manufacture of steel is a unified process. Raw materials must be kept flowing to the blast furnaces, and molten metal must be kept flowing to the open-hearths to keep them in operation and to avoid "skulling" the ladles in which the metal is carried. (Ex. 47, R. 808–809.)

At times a separate locomotive and crew of South Buffalo stood by at the Steel Company's structural shipping yard where orders were received directly from Steel Company employees (R. 319–321, 323).[*] At times it is plain that the Steel Company, in turning over loaded cars to South Buffalo for delivery to other points within the plant where they could not be received owing to congestion, utilized South Buffalo's facilities for purposes of storage (Ex. 148, R. 816–817). South Buffalo in 1941 was still consulting the Steel Company as to the type of locomotives to be purchased for maximum service to the Steel Company (Exs. 87, 88, R. 753–755). The testimony of an Interstate Commerce Commission employee who observed operations between South Buffalo and the Steel Company in 1943 reveal the coordination of effort for the Steel Company's convenience in producing steel (R. 410–426).

Among unusual practices showing the essential unity of South Buffalo and the Steel Company is one whereby the Steel Company pays substantial sums to South Buffalo based on the latter's records alone and despite the Steel Company's records. The Steel Company issues a shipper's order (known as R–115—see Ex. 152, R. 851)

[*] This was a practice stopped by Dullenkopf when he became superintendent in 1943 as "not an arrangement that I felt was proper" (R. 321).

supposedly for each switching service movement requested (R. 355). South Buffalo's conductors make out switch lists showing each switching movement (Ex. 153, R. 852). Both the R–115's and the switch lists are passed to South Buffalo's Car Record Department where, if the switch list shows a movement not covered by an R–115, South Buffalo makes out ("forces") an R–115 for the movement shown by the switch list (R. 355–357). Since ten or fifteen R–115's are forced by South Buffalo daily (R. 358) and a switching move cost ranges up to $8.80, the sum involved is substantial. Daily South Buffalo bills, and the Steel Company pays, the sum owing as a result of forced R–115's (R. 360). The district court detailed this practice in shortened form in Finding 45 (R. 920) and thought it "somewhat loose." But, considering the practice beneficial to South Buffalo, and not to the Steel Company, the court concluded it did not evidence Steel Company domination of South Buffalo. We think in this conclusion the court took far too narrow a view of the evidence before it. The parties engaged in this "loose practice" precisely because it was immaterial which of the two it benefitted since both were merely different pockets of the Bethlehem organization. Evidence of practices of this character is particularly impressive in establishing the lack of divorcement between production and transportation.

(Elgin) and of several steel producers (including Illinois Steel Company) whose products were transported by the railroad. Elgin operated about 195 miles of road, known as the "Chicago Outer Belt Line," which served many industrial plants and connected with every railroad entering Chicago. About 60% of Elgin's tonnage was derived from transporting the products of six producing companies wholly owned by United States Steel Corporation. Elgin's shares were acquired by the Steel Corporation upon the Corporation's formation in 1901. Suit against Elgin was brought by the Government in 1930.

The elements of the instant case which most clearly establishes the domination of South Buffalo also presents its sharpest contrast with the *Elgin* case. The manner in which South Buffalo was staffed by Steel Company personnel has been previously set forth (*supra*, pp. 81–86). At the time of trial, the seven important executive officials of South Buffalo were prior employees of the Steel Company. South Buffalo's president was chosen because he had 30 years' experience in steel-making with the Steel Company. Moreover, South Buffalo's officers (with one exception) held identical offices with six other similarly situated railroad subsidies of the Holding Company.

The picture in the *Elgin* case was the reverse of this. No single one of the executive officers of Elgin whose experience was revealed by the

record was shown to have had any prior connection with the holding company or any of its subsidiaries or any experience with companies producing similar products. Elgin's president at the time of complaint had been employed by Elgin for more than 30 years, progressing from clerk to the president to the presidency (Elgin R. 77). His predecessor as president had served in that office for 30 years, had been an Elgin employee for almost 40 years or before the creation of the United States Steel Corporation, and his prior experience had been that of a railroader (Elgin R. 25, 35-36). Elgin's vice-president served it some 24 years, rising from clerk in the Traffic Department, and his earlier employment record included railroad experience (Elgin R. 76, 86). Both the purchasing agent and chief accountant of Elgin had long employment records with Elgin (at least 23 years and 16 years, respectively) (Elgin R. 72, 94, 98).

Elgin's board of directors was selected and voted upon by Elgin's president to whom the holding company gave its proxy as stockholder (Elgin R. 30, 42, 47). After 1920, Elgin's directors were selected from officials or employees of Elgin with a few exceptions (all Chicago bankers (Elgin R. 47)). Elgin's officers were selected by the directors on the basis of recommendations by its president (Elgin R. 42).

There is a second striking point of dissimilarity between *Elgin* and the present case. There was

not the least direct linkage between Elgin and any of the producing subsidiaries of United States Steel which Elgin served. The control over Elgin alleged by the Government was the control of the Holding Company only. Attention was focused on the relations between Elgin and United States Steel, and nothing was developed respecting Elgin's relations with the producing subsidiaries in Chicago. This is in complete contrast to the constant and intimate relations between railroad and shipper which the record here presents.

The facts upon which the Government relied in the *Elgin* case may be fairly summarized as follows:

(1) Three types of what may be described as home-office fiscal control were disclosed: (a) The parent corporation, United States Steel Corporation, required subsidiaries, including Elgin, to secure approval of capital expenditures in excess of $10,000, later $5,000. In fact, there was no instance in which the parent's approval was withheld (Elgin R. 37, 97). Less than 4% of Elgin's total expenditures over a five-year period was subject to the formality of its parent's approval (Elgin R. 414). (b) Elgin deposited surplus funds in a so-called Advance Account maintained by the parent, and in times of need withdrew funds by virtue of drafts drawn on the account (Elgin R. 54). The evidence was in dispute as to whether such deposits

were required and whether withdrawal required the parent's consent. (c) The parent maintained a "Clearance Account" through which transactions among its various subsidiaries were cleared (Elgin R. 53).

(2) Two instances of the parent's invasion of the details of Elgin's management were asserted. Both involved conclusion of highly important agreements by Elgin: (1) the lease of a railroad which was wholly owned by another subsidiary of United States Steel and of which Elgin's president was also president prior to the lease (Elgin R. 28); and (2) the conclusion of a trackage agreement with a second and independent railroad (Elgin R. 30–32). Both agreements became effective as to Elgin in 1909. The Chairman of the parent's board of directors and its Comptroller were consulted respecting the making of the lease in 1909 and on several occasions in later years respecting amendments to both agreements. The Government asserted undue tampering in the conclusion of these two agreements only out of 2,313 agreements executed by Elgin over a 23-year period (Elgin R. 39, 81).

(3) The parent had system-wide bonus, pension and stock purchase plans. Reports and estimates were required to be furnished the parent by the subsidiary.

(4) Elgin and other United States Steel subsidiaries had contiguous offices in Chicago, employed common counsel, and periodical meetings of their presidents were held as to which Elgin's president "attended probably half of them, maybe more" (Elgin R. 26). Elgin's president had discussed its declaration of dividends with officials of the parent.

We submit that it is apparent that virtually all of the controls present in *Elgin* are equalled or exceeded by similar controls here present. The loose and long-range fiscal controls by the holding company in *Elgin* are not so clearly within the very evil at which the Commodities Clause was aimed as are the day-to-day and on-the-ground control of South Buffalo by the producer in this case. We do not here indicate disagreement with the view of the dissenters in *Elgin* that the railroad was in fact dominated by its parent; we only assert that proof of domination is stronger here.

Finally, it may be noted that even the majority in *Elgin* appeared to feel that a determination of domination would have been reached at an earlier date. The majority referred to "isolated acts" which indicated "undue control over the carrier" but said that most of these had taken place years ago, some of the more important in 1909 (p. 503). The objectionable practices have not ceased here. An unbroken record of domination over South Buffalo from 1922 to the time of trial was disclosed.

III

THE MISCELLANEOUS ARGUMENTS ADVANCED BY APPELLEES TO ESCAPE THE APPLICATION OF THE COMMODITIES CLAUSE ARE WITHOUT MERIT

A. *South Buffalo is a "Railroad Company" within the Purview of the Commodities Clause.*— Appellees urged below that, irrespective of any interest which South Buffalo may have in the commodities it transports, the Commodities Clause is not applicable to its operations. In their view, South Buffalo escapes the prohibitions of the clause because it is not a "railroad company" within the purview of the clause. While we have difficulty in following this argument in the face of the obvious physical facts, it appears to be that South Buffalo is merely an "industrial" or "switching" or "terminal" railroad and that the Commodities Clause was never intended to apply to limited operations of this character.

This argument is bottomed primarily on South Buffalo's relatively restricted size when compared with line-haul carriers. But the Commodities Clause makes no distinction based on size nor does size alone have any material relation to the evils at which it was aimed. If strategically located railroads such as South Buffalo are permitted to escape the impact of the Commodities Clause merely because they are small, that Clause will be substantially stripped of its effectiveness. Domination of the strategically placed railroad,

however small, which other shippers, including competing shippers,[50] are forced to use, presents the producing interest full opportunities to engage in discriminatory practices against such shippers. And, whatever the length of such a railroad, a division of joint through rates with line-haul carriers must be made, and here the producing interest is presented with the opportunity to exact and conceal discriminatory rates.[51]

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[50] South Buffalo serves the following industries which are competitive with the Steel Company: Republic Steel Company, Donner-Hanna Coke Corporation, Hanna Furnace Company, and Bliss & Laughlin, Inc. (R. 598).

[51] This is an ancient evil. The Interstate Commerce Commission in its Eighteenth Annual Report (Dec. 19, 1904) referred to the manner in which manufacturers "obtained what was in effect a rebate upon the transportation of its product to certain points by organizing a railroad, publishing a joint through rate with and obtaining a division from the various railroads transporting that product" (p. 19). The "length to which this evil may go" was illustrated by the situation between the Chicago, Lake Shore & Eastern Railway and Illinois Steel Company, both wholly owned companies of United States Steel Corporation. The Commission reported that the Lake Shore road had only some 6 or 7 miles of main line but that some 62 miles of track were operated within the private grounds of Illinois Steel's South Chicago plant. Its primary function was intra-plant switching for Illinois Steel and only secondarily did it interchange traffic. The Lake Shore was allowed a division with eastern lines of 10% on business to eastern seaboard destinations, 15% to Pittsburgh and points west, 20% on business to the Missouri River. The divisions to Lake Shore were "much in excess of fair compensation" (pp. 21–22). See also *In the Matter of Divisions of Joint Rates and Other Allowances to Terminal Railroads*, 10 I. C. C. 385.

In the *Elgin* case, the railroad presented fully to this Court the argument now made that the Commodities Clause was intended to apply only to line-haul carriers and not to small roads which, for certain purposes, might be described or classified as "switching" or "terminal" railroads. This Court's failure to allude to the argument must be considered a complete rejection of it. While it is true that the railroad in *Elgin* operated across state lines, this point is immaterial as we shall shortly demonstrate (*infra*, pp. 107–113). For the criterion for application of the Commodities Clause is engagement in interstate commerce, not transportation across a state line, and South Buffalo undeniably engages in interstate commerce.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, the appellee corporation pointed out that it was originally authorized to mine coal and construct a canal, and only subsequently to operate a railroad. The corporation urged, therefore, that it was an industrial, not a railroad, company, asserting "clearly the term 'railroad company' as used in the commodity clause does not apply to every corporation which operates a railroad" (p. 387). This argument was rejected as "without merit" since "the corporation was engaged as a common carrier by rail * * * in the channels of interstate commerce, and as such

we think it was a railroad company within the purview of the clause" (p. 418).

To establish that South Buffalo was not a "railroad company," appellees relied below on a quotation taken from context where this Court recognized, for purposes of the problem before it, the "essential difference between terminal systems properly so described and railroad transportation companies." *United States* v. *St. Louis Terminal*, 224 U. S. 383, 401–402. The statement was made in the course of the Court's refusal to apply to the terminal railroad the same standards of enforced competition under the Sherman Act which it applied to line-haul carriers in *Northern Securities Co.* v. *United States*, 193 U. S. 197. The Court reasoned that to require a number of terminal railroads, with necessary attendant facilities, might slash a city to ribbons and perhaps be impossible in St. Louis the peculiar topography of which severely limited the space available for location of terminal facilities. The "essential difference" the Court was recognizing thus consisted in governing geographical facts; the statement has no possible reference to what constitutes a "railroad company" under the Commodities Clause."

[1] Actually the Court concluded 224 U. S. at 406 that the St. Louis Terminal was "something more" than a terminal company since its activities were not confined to interchange and pickup of traffic. South Buffalo is not merely a "terminal company." It files tariffs for transportation from points on its line to others.

The legislative history of the Commodities Clause fully refutes the argument now made in disclosing clear Congressional intent that it apply to all common carriers by rail, however small. The Clause's application and possible undue injury to "small" railroads was urged without success as a reason for rejecting the Clause's enactment. The exemption respecting the transportation of timber and its products was written into the Clause expressly to cover logging company railroads, stated to be as small as five miles in length. (See, *infra*, pp. 112 to 113).

B. *The Commodities Clause is Applicable though South Buffalo Does Not Operate Across a State Line.*—Appellees further contend that the Commodities Clause is in no event applicable to South Buffalo's operations because those operations fall outside the prohibition against transportation of commodities "from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia * * *." While is true that South Buffalo does not cross a state line, it is also true and undenied that it operates in interstate commerce.

Section 1 of the Interstate Commerce Act itself specifies its application to carriers engaged in transportation from one state to another. It has always been clear that the act applies to carriers engaged in interstate commerce though they operate wholly within one state. *United States* v.

Union Stock Yard Co., 226 U. S. 286; *Tap Line Cases*, 234 U. S. 1, 26.

Two other sections of the act originally embodying the Commodities Clause [23] couched their prohibitions as applicable to carriers in performing transportation from one state to another state. The prohibitions have been held to extend to transportation in interstate commerce, whether or not the carrier involved in fact operates across a state line. *Powell* v. *United States*, 112 F. 2d 764 (C. C. A. 4); *United States* v. *New York Central R. Co.*, 153 Fed. 630 (W. D. N. Y.); *M. K. & T. R. Co.* v. *Plano Milling Co.*, 231 S. W. 100 (Tex. Civ. App.), certiorari denied, 258 U. S. 624.

The Congressional understanding that, in using in the Commodities Clause the long phrase describing transportation from one state to another, it was simply using a phrase of art which comprehended interstate commerce, has always been recognized by this Court. In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, the Court repeatedly referred to the issue as one involving whether a railroad company engaged in "interstate commerce" should be free of interest in the commodities it transported (pp. 406, 407, 409;

[23] The act is the so-called Hepburn Act (34 Stat. 584). The sections are section 2 (the Elkins Act), now embodied, as amended, in 49 U. S. C. 41 (3) and section 7 (the Carmack Amendment) now embodied, as amended, in 49 U. S. C. 20 (11).

415). Subsequent cases have similarly referred to the Commodities Clause as operative upon carriers engaged "in interstate commerce."[54]

The legislative history of the Commodities Clause discloses clear Congressional intention that it apply to all railroads engaged in interstate commerce, irrespective of whether the railroad crossed a state line. The original draft of the bill introduced by Senator Elkins provided in substance that it should be unlawful for common carriers "subject to the provisions of this act" to engage in production or manufacture. (40 Cong. Rec. 6455). Discussion of this draft resulted in the tentative conclusion that its purpose might be construed to control industry rather than commerce, and, hence, beyond the power of Congress. Senator Daniel then said:

> It seems to me that the amendment takes hold of the subject by the wrong handle and puts its interdict on the wrong thing. It is the transportation of such things in interstate commerce, not engaging in interstate commerce at all, to which it seems to me the aim of Congress should be directed. *If the amendment would say in so many words that no carrier shall transport in interstate commerce* articles of

[54] *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 263, 265, 266, 271–272; *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, 373; *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 525; *United States* v. *Reading Co.*, 253 U. S. 26, 61.

> which it is itself the producer or the manufacturer, that would reach it, if Congress can reach it. (Italics supplied) (40 Cong. Rec. 6458).

Senator Daniel proposed an amendment, which for parliamentary reasons could not then be considered, in which the phrase "from one State, Territory * * * to another State, Territory" appeared for the first time. It read:

> It shall be unlawful for any common carrier to transport from one State, Territory, or district of the United States to another State, Territory, or district of the United States or to any foreign country any article or commodity whatever which may be owned by it or in which it has any interest, excepting such as are necessary for its own use in its business as a carrier and not intended for sale, barter, or commercial traffic of any sort. (40 Cong. Rec. 6461).

There was no discussion of the phrase above partially quoted; but from his previous statement it seems clear that Senator Daniel intended his amendment to mean that "no carrier shall transport in interstate commerce articles of which it is itself the producer or the manufacturer."

Senator Elkins two days later introduced the following modification of the amendments that he had previously introduced, and, except that the words "railroad company" were later substituted for "common carrier" and that the exception

relating to timber and timber products was inserted, this amendment is substantially in the form in which it was adopted and as it now appears as Section 1 (8), 49 U. S. C.:

> From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier. (40 Cong. Rec. 6568.)

Thereupon, Senator Bacon stated that he did not think this amendment would be effective in that it "does not in any manner prevent (railroad companies) continuing to own the coal mines or continuing to transport the coal, so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated." (40 Cong. Rec. 6568.) Senator Bailey immediately rejoined:

> * * * Mr. President, no law of Congress can control the transportation of any article taken up inside and put down inside of a State. But no carrier can be or will be permitted to withdraw its interstate com-

> merce from the jurisdiction of the Federal Government by consigning it twice, because if it starts from one State and finally goes into another State or into a foreign country the Federal Government's jurisdiction attaches." (40 Cong. Rec. 6569.)

No exception was taken to Senator Bailey's rejoinder as to the effect of the amendment on transportation in interstate commerce and no further comment upon this point was made by Senator Bacon. The amendment was agreed to by the Senate acting as the committee of the whole. (40 Cong. Rec. 6570.)

The intention of Congress to apply the Commodities Clause to all railroad companies engaged in interstate commerce is further apparent from the circumstances under which timber and timber products were excepted from its operation. Senator Piles, of Washington, was much concerned about the effect of the proposed statute upon small logging roads owning or owned by sawmills in his state. He said:

> * * * We are not logging in that country with horses and wagons or oxen. We are logging by means of railroads. Those railroads, running from 5 to 40 or 50 miles back into the forests, necessarily penetrate the valleys. People to a certain extent have settled in those valleys and have builded for themselves homes. Their little freight, as a matter of accommodation more than any-

> thing else, and some passengers, are carried by the logging railroads. Those logging roads own sawmills on tide water, or the mill companies own the logging roads. The roads take the timber to the sawmills, where it is sawed into lumber. The mill companies own their own schooners, both steam and sail. When the timber is sawed into lumber it is transported on these schooners to all parts of the maritime world. (40 Cong. Rec. 7012–7013.)

In order, therefore, that these logging railroads might be excepted from the provisions of the statute, Senator Piles introduced the amendment excepting timber and timber products and this amendment was adopted. (40 Cong. Rec. 7015).

Finally, Senator Elkins, in reply to Senator Piles and other Senators who contended that this statute, if enacted, would jeopardize small industrial railroads in their respective states, stated that this might be so but that, nevertheless, it was necessary that this legislation be enacted. He said:

> This is the main question. If incidentally during production and transportation it works injustice to small enterprises or to large ones, like those alluded to in California, Washington, and Oregon, the great principle contended for should not be prevented from becoming law because it might injure some smaller interest. (40 Cong. Rec. 7014.)

C. *Violation of the Commodities Clause May Not Be Justified by Reference to the Shippers Allowance Clause.*—Appellees next argued below that, if it is determined that South Buffalo has an interest in the commodities of the Steel Company which it transports, that determination will necessarily be reached only by concluding that South Buffalo has no separate corporate existence which must be respected. The obliteration of South Buffalo would mean that what remains is an entity essentially engaged in producing steel though also operating limited railroad facilities. To this situation, it is asserted the Commodities Clause would have no application; it is governed solely by the Shippers Allowance Clause which, in substance, authorizes a common carrier to make a just allowance to a shipper who renders a service connected with the transportation.[55]

[55] The Shippers Allowance Clause provides (49 U. S. C. 15 (13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

We do not believe that the application of the Commodities Clause may thus ingeniously be defeated by what this Court has recognized as proof that it applies. But the singular nature of this argument has not prevented its previous advancement. It was a principal contention of the railroad in the *Elgin* case but, though its acceptance there would have defeated the Government's case at the threshold and rendered it unnecessary for this Court to consider the voluminous evidence as to "domination," this argument received no mention in the Court's opinion.

The line of demarcation between the Commodities Clause and the Shippers Allowance Clause for present purposes is the plain one which the Interstate Commerce Commission long ago set forth. In *Manufacturers Ry. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93, 101–102, the Commission said:[56]

> Similarly, allowances are frequently made by the trunk line to an industry under Section 15 of the act for services rendered by an industrial line owned by it or its stockholders, as for an instrumentality furnished by the shipper, the only concern of the Commission in such case being to satisfy itself that the allowances

[56] The order issued by the Commission in this case was affirmed, by this Court, but without reference to the present point of inquiry, in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

are not above the reasonable cost of the service and therefore are not indirectly a rebate of a part of the trunk line's charge to the owning industry through the medium of the latter's industrial railway. * * *

Frequently the industrial line develops new traffic, and shippers other than the owning industry locate on its rails, whereupon the owning industry or its stockholders separately incorporate the railway, which thereupon files tariffs with the Commission, claims thenceforth to be wholly separate and distinct from the owning industry, and thereafter holds itself out to serve the owning industry and its other shippers impartially. Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be, *it is evident that allowances under section 15 of the act can no longer be made to the owning industry as for services rendered by the shipper,* as the railway is no longer a part of or in law connected with the latter which is "the owner of the property transported," to *whom alone,* under that section of the statute, allowances may be made, but is in the contemplation of the act in the same position as it would be if it had been constructed and was being operated by parties having no interest whatever in the owning industry. * * * [Italics supplied.]

In *In Re Allowances to Kanawha etc. Ry. Co.*, 41 I. C. C. 53, the Commission said (p. 59):

> The argument frequently is made and is made here that this provision [Commodities Clause] conflicts with the provision of section 15 of the act relative to the compensation of shippers by railroads for assisting them in the service of transportation or for furnishing facilities for such service and that industrial railroads and tap lines are therefore beyond the purview of the commodities clause. The argument is fallacious. Section 15 recognizes the common-law right of railroads to perform their public duties through agents and by means of hired facilities and merely provided that the Commission may regulate the compensation paid to the agent employed or to the owner of the facility hired if the agent or owner of the facility is also a shipper.

Appellees may, however, renew their argument made below that the Commission has impliedly and repeatedly sanctioned both South Buffalo's relationship in particular and other similar situations generally. The Commission has frequently had before it inquiries as to whether industrial common carriers might participate in joint through rates with line haul carriers. South Buffalo has specifically been held entitled to such participation. *Lackawanna Steel Co.* v. *South*

Buffalo Railway, 56 I. C. C. 684; *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie R. Co.*, 91 I. C. C. 300. Similar holdings in respect of other industrial railroads are many.[37]

But the Commission has recognized that it has no original jurisdiction to enforce the Commodities Clause. *Construction of Line by Jefferson Southwestern*, 86 I. C. C. 796. At times when the issue before it concerned the character of service rendered by an industrial railroad, the Commission has warned that its inquiry had nothing to do with the Commodities Clause and that its action was not to be regarded as sanctioning relations violative of that clause. *Industrial Railway Case*, 32 I. C. C. 129, 133. But silence upon collateral and unrelated issues may not be tortured into sanction of law violations.

D. *There Is No Burden on the Government to Prove Discriminatory Practices by South Buffalo.*—At the trial appellees called a number of witnesses who were officials of companies whose plants were served by South Buffalo. They were permitted by the district court, over the continuing objection of the Government (R. 513), to testify generally that the service provided by South Buffalo was satisfactory and had kept pace with their needs (e. g., R. 519, 565). There was no shipper, however, for which South Buffalo

[37] See, e. g., *Indiana Northern Ry.* case, 37 I. C. C. 491; *National Tube Co.* v. *Lake Terminal R. Co.*, 55 I. C. C. 469.

provided a service in any way comparable to that provided for the Steel Company. In no case did South Buffalo perform intra-plant switching for its other customers of any comparable scope,[58] nor did it own and operate trackage within the plant enclosures of other customers.[59]

Obviously the character of service provided to other shippers was not material to the issues of this case. In view of the purpose and general applicability of the Commodities Clause, it has always been recognized that "the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers." *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, 370. The sole fact that control of both carrier and producer by the same interest makes "rebates, discriminations, attempts to monopolize and other abuse of carrier power, easy, and their detection and punishment difficult" has been recognized as the primary consideration which underlies the Commodities Clause. Mr. Justice Stone, dissenting in *United*

[58] Usually South Buffalo does no intra-plant switching for its other customers (R. 518, 544–545, 550, 566, 585). A limited type of what may be described as intraplant switching is done for some (R. 528, 555, 578–579). Thus, the Maritime Milling Company owns four tracks, two paralleling the north side, and two paralleling the south side, of its plant, South Buffalo at times moves a car from one track to another (R. 528).

[59] R. 522, 533–534, 544, 557, 565–566, 572, 579, 585.

States v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 506.

The Government in the trial of this case made no effort to show that South Buffalo had in fact discriminated against other customers in favor of the Steel Company, or that its ownership had been utilized by its co-appellees to bargain for and obtain discriminatory rates from line-haul carriers.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed.

Respectfully submitted.

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